(25,340)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 510.

GREAT NORTHERN RAILWAY COMPANY AND WILLMAR AND SIOUX FALLS RAILWAY COMPAIY, PLAINTIFFS IN ERROR,

vs.

THE STATE OF MINNESOTA *EX REL.* VILLAGE OF CLARA CITY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

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1 *Petition for Writ.*

STATE OF MINNESOTA ex Rel. VILLAGE OF CLARA CITY, Relator and Respondent,

vs.

GREAT NORTHERN RAILWAY COMPANY and WILLMAR & SIOUX FALLS RAILWAY COMPANY, Appellants.

To the Honorable District Court of Chippewa County, Minnesota:

Your petitioner, The Village of Clara City, respectfully represents and shows to this Court:

1.

That the Village of Clara City is now and during all times mentioned in this petition has been a municipal corporation duly
2 organized and existing, as a Village, under the General Laws of the State of Minnesota and composed of territory situated wholly within said County and is possessed of all the general powers conferred by the laws of the State of Minnesota on such corporations.

2.

That the respondents are now and during all the times mentioned in this petition have been corporations duly organized and existing under and by virtue of the laws of the State of Minnesota.

3.

That the respondent, The Willmar & Sioux Falls Railway Company, during all the times mentioned in this petition has and does now own a strip of land 300 feet wide running through said Village in a Northeasterly and Southwesterly direction and crosses Bonde street in said Village; that a part of said strip of land, but not all thereof, is used by the other respondents for Railway purposes and that during all the times mentioned herein the Great Northern Railway Company has maintained a main track and two side tracks on said strip of land.

4.

That the respondent, The Great Northern Railway Company, during all the times mentioned in this petition has been and now is the lessee of said Right of Way and strip of land and during
3 the times mentioned in this petition has had the possession of that part of said strip of land on which the tracks are located and manages, operates and controls the Right of Way running through said Village, including said strip of land.

5.

That Bonde street in said Village is now and during all the times mentioned herein has been a street duly laid out and dedicated to the public and for more than 15 years last past has been, traveled, worked and kept in repair by the said Village as one of the public streets in said Village and that said Bonde street crosses said strip of land and the defendant's track and Right of Way immediately North of its depot and water tank.

6.

That said street is one of the principal streets in said Village and the only street crossing said strip of land and Right of Way and the only avenue or street on which the people, teams or pedestrians can travel or cross from that part of the Village lying on the West side of said strip and Right of Way to the East side thereof.

7.

That there are business houses on both sides of said strip of land and Right of Way and that a large portion of the people doing business in the Village on the West side thereof live on the East side of the Right of Way and that it is necessary for such
4 people to cross said strip of land and Right of Way on said Bonde street several times a day and that a sidewalk as ordered built is very essential.

8.

That on the 27th day of August, 1914, at a meeting duly held by Village Council of said Village, it was duly ordered, determined and directed that a sidewalk be constructed on the South side of Bonde street from Spicer avenue lying West of the Right of Way easterly on Bonde street to Bell avenue on the East side of said right of way and to connect with the sidewalk already built across Spicer and Bell avenues, and it was further ordered, determined and directed that said sidewalk be built 6 feet wide in the following manner:

"Foundation shall consist of a layer of *said* and gravel not less than six inches deep and must be thoroughly rammed or tamped with suitable tools satisfactory to the Council. Bed shall consist of a layer two inches in depth, composed of Portland Cement, one part, and six parts of sand, shall be thoroughly mixed while dry, the mixture shall then be wet sufficiently to make it of the proper consistency for a bed for the surface and which surface shall be laid before the cement of the bed sets. The bed shall be so prepared as to present an even and uniform surface. The surface shall consist of a layer of one-half inch thickness, composed of one part Portland Cement and two parts of good, sharp sand. The surface shall be smooth and finished to the grade established by the Council."

5 and that said sidewalk be completed on or before the 20th day of October, 1914, and it was further ordered, determined and directed that the order and resolution requiring such sidewalk

to be built should be duly served on or before the 4th day of September, 1914, upon the owners of all the lots, parcels of ground, fronting on said Bonde street where said sidewalk was ordered to be built and whose names were set forth in the resolution, and that said service to be made in accordance with the statutes in such cases made and provided: That the owners whose names were set forth in said resolution were the respondents herein and that the property owned by them was described as The Right of Way of said Railway companies running through the Village in a southwesterly direction and approximately 300 feet wide. That sidewalks have been built on Bonde street except opposite said Right of Way.

9.

That said resolution was duly and regularly published in the Clara City Herald, a legal newspaper then printed and published in said Village for the length of time required by law, and in addition to such publication, the resolution was duly and personally served upon the defendants herein on the 1st day of September, 1914, as will more fully appear by the return now on file.

10.

That the respondents have failed, neglected and refused to
6 build said sidewalks, claiming, as relator is informed and believes, that they are not required to do so; that the gross earnings tax paid by respondent, The Great Northern Railway, is in lieu of all taxes and assessments of every kind.

11.

That in holding their meeting, passing the resolution, giving notice by publication and otherwise and in all other matters, the said Village Council in all and every respect complied with the provision of law relating thereto.

Wherefore, your petitioner, who has made no other application, therefore prays that a writ of mandamus be issued commanding the said respondents to build, construct and maintain the said sidewalk in accordance with the said resolution or show cause before this Court at a time and place to be fixed by it why they have not done so.

THE VILLAGE OF CLARA CITY,
By J. J. ULFERTS,
President of Village Council.
G. A. LEIPOLD,
Village Clerk.

STATE OF MINNESOTA,
County of Chippewa, ss:

G. A. Leipold, being duly sworn, says that he is Clerk of the Village Council of the Village of Clara City, the above named petitioner and makes this affidavit for and in its behalf; that he has read the foregoing petition, knows the contents thereof and that the same is true of his own knowledge except as to those matters therein stated on his information and belief and as to those matters he believes them to be true.

G. A. LEIPOLD.

Subscribed and sworn to before me this 6th day of February, 1915.

[NOTARIAL SEAL.] GEO. N. SCHULTZ,
Notary Public, Chippewa Co., Minn.

My commission expires August 8, 1918.

(Here follows map marked p. 6½.)

Exhibit "A".

Attached to and made part of the petition in Stark ex rel. Clara City vs Great Northern Ry. Co.

CLARA CITY

Chippewa Co. Minnesota

Sec's-7-12-T.117-R.38-39

Scale-1"-100'

Feb. 9th 190

Corrected to Sept

1020

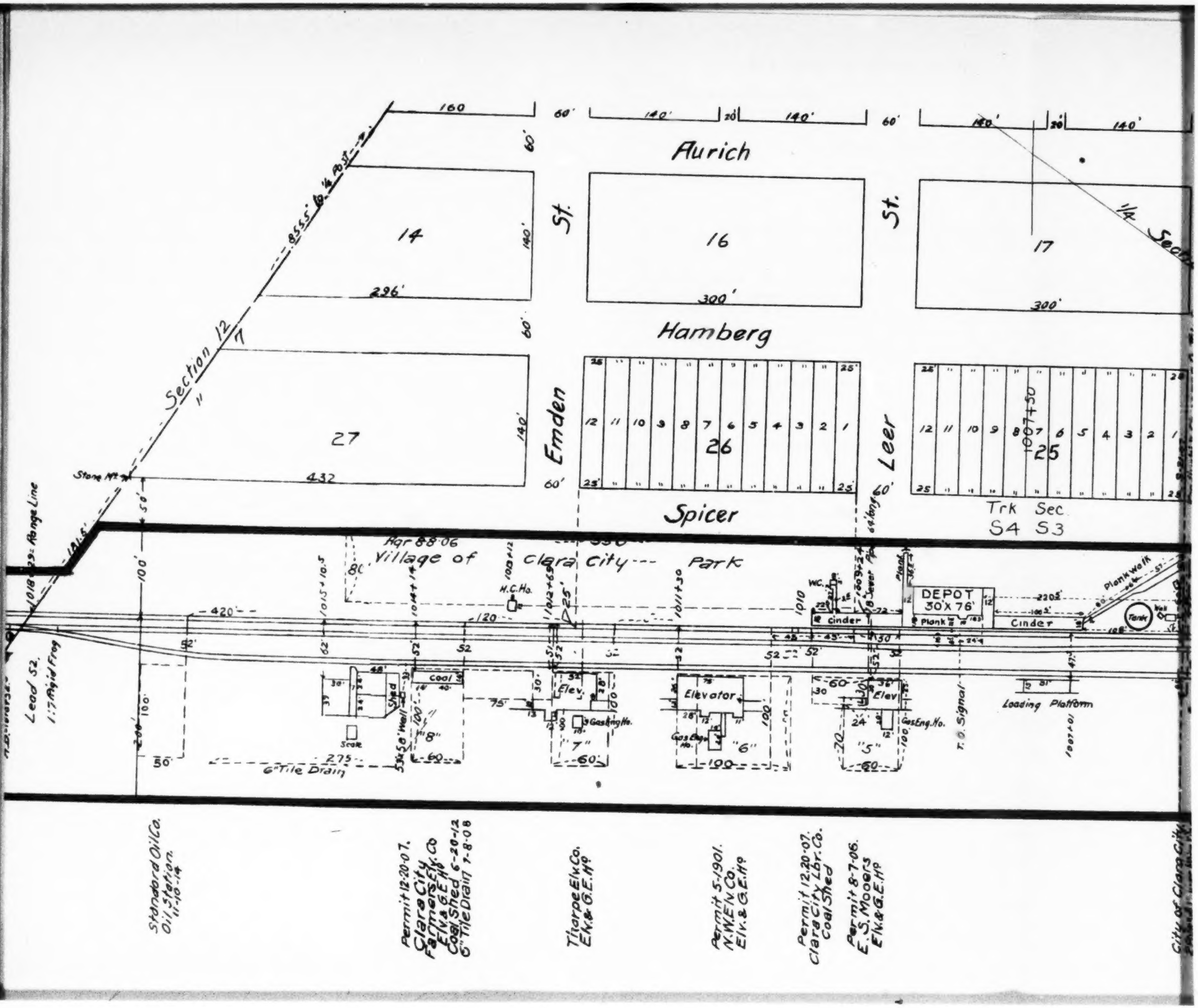
1500' of 76½ rail WITH 75 ft ROW

St Sm To be Changed

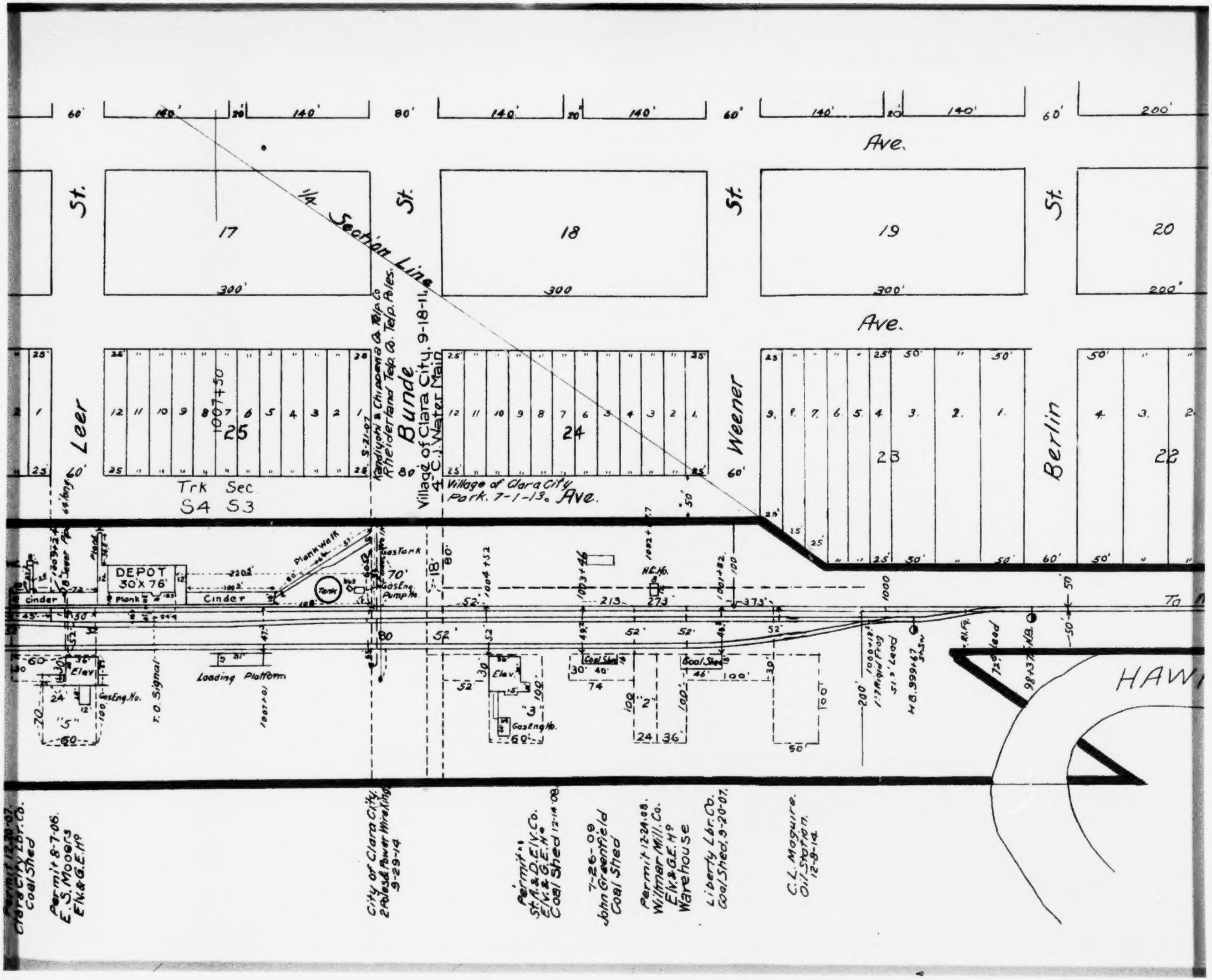
No 6'10

Great Northern Ry. & Village of Clara City } P. 6½

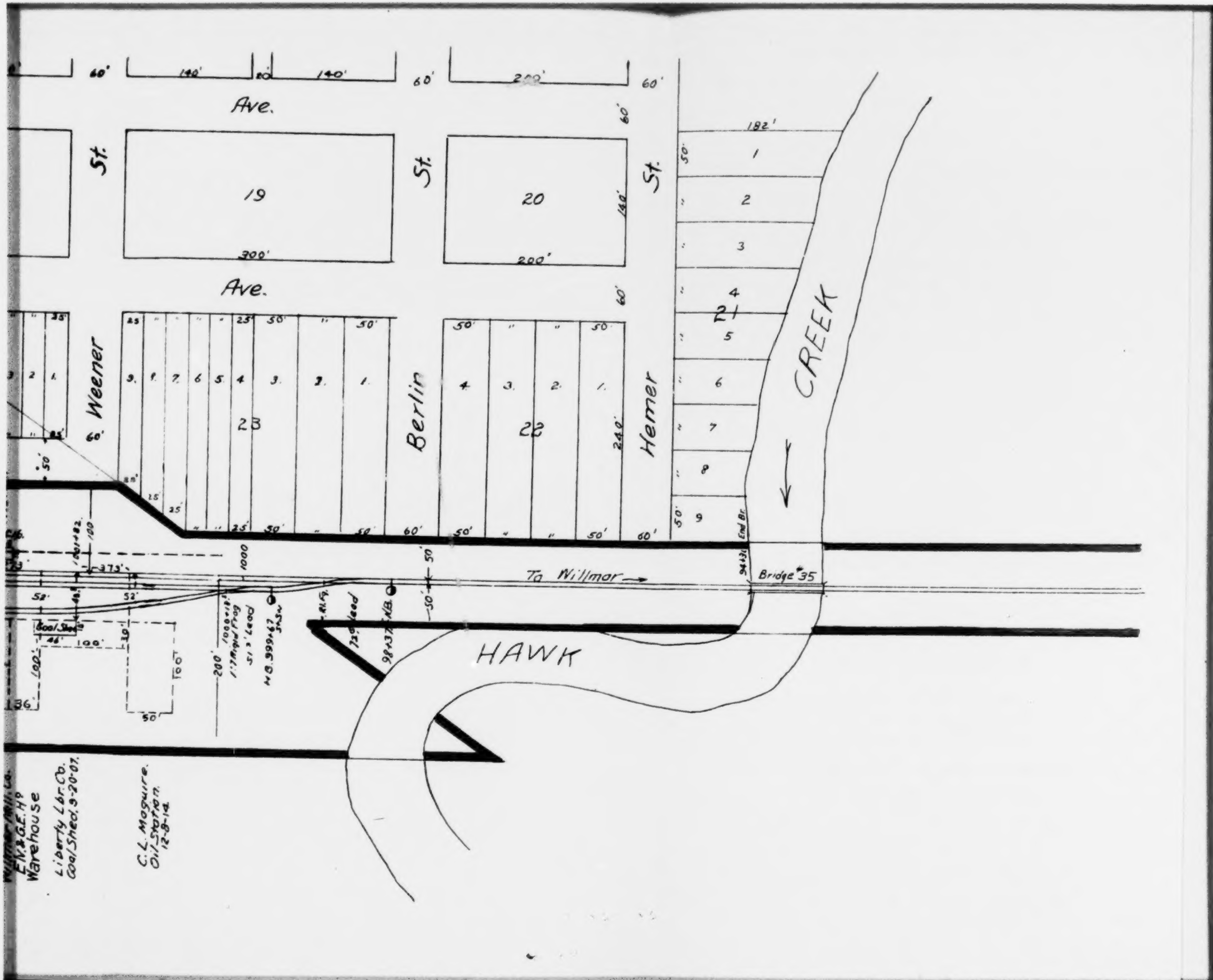
Range Line betw



Aurich
St.
Hamberg
Emden
Leer
Spicer
14
16
17
27
26
25
1/4 Sec
Section 12
Range Line
Village of Clara City --- Park
DEPOT 30'X 76'
Cinder
Plank
Plankwalk
Tank
Trk Sec.
S4 S3
Lead 52
1:7 Rigid Frog
6" Tile Drain
Coal
Shed
Scale
Elev.
Elevator
Gas Eng. Ho.
T.O. Signal
Loading Platform
"8"
"7"
"6"
"5"
Standard Oil Co. Oil Station. 11-10-14
Permit 12-20-07. Clara City Farmers Elv. Co Elv. & G.E. Ho. Coal Shed 6-20-12 6" Tile Drain 7-8-08
Thorpe Elv. Co. Elv. & G.E. Ho.
Permit 5-1901. N.W. Elv. Co. Elv. & G.E. Ho.
Permit 12-20-07. Clara City Lbr. Co. Coal Shed
Permit 8-7-06. E. S. Mooers Elv. & G.E. Ho.
City of Clara City



Ave.
St.
17
18
19
20
300'
300
200'
1/4 Section Line
Ave.
Leer
Bunde
Weener
Berlin
25
24
23
22
1007+50
Kandiyohi & Chippewa Co. Telp. Co.
Rheiderland Telp. Co. Telp. Poles.
S-21-07
Village of Clara City. 9-18-11.
4" C. I. Water Main
Village of Clara City
Park. 7-1-13.
Trk Sec
S4 S3
DEPOT
30'X 76'
Cinder
Plank
Plankwalk
Tank
Gas Tank
Gas Eng. Pump Ho.
Elev.
Gas Eng. Ho.
"5"
T.O. Signal
Loading Platform
Elev.
"3"
Gas Eng Ho.
Coal Shed
"2"
Coal Shed
1:7 Rigid Frog
Lead
H.B.
HAW
To
Permit 12-30-07.
Clara City Lbr. Co.
Coal Shed
Permit 8-7-06.
E. S. Moores
Elv. & G.E. Ho
City of Clara City.
2 Poles & Power Wire Xing
9-29-14
Permit
St. A. & D. Elv. Co.
Elv. & G.E. Ho
Coal Shed 12-14-08
7-26-09
John Greenfield
Coal Shed
Permit 12-24-08.
Willmar Mill. Co.
Elv. & G.E. Ho
Warehouse
Liberty Lbr. Co.
Coal Shed, 9-20-07.
C. L. Maguire.
Oil Station.
12-8-14.



Ave.
Ave.
Weener St.
Berlin St.
Hemer St.
19
20
21
22
23
CREEK
HAWK
To Willmar
Bridge #35
Coal Shed
Willmar Mill Co.
E.N.&G.E. Ho
Warehouse
Liberty Lbr. Co.
Coal Shed, 9-20-07.
C.L. Maguire.
Oil Station.
12-8-14.

7 STATE OF MINNESOTA,
County of Chippewa:

In District Court.

THE STATE OF MINNESOTA ex Rel. THE VILLAGE OF CLARA CITY, Relator,
vs.
THE GREAT NORTHERN RAILWAY COMPANY and THE WILLMAR & SIOUX FALLS RAILWAY COMPANY, Respondents.

The alternative writ of mandamus prayed for in the attached petition is hereby allowed returnable at my chambers in the Court House in the City of Willmar, in Kandiyohi county, Minnesota, on the 23rd day of February, 1915, at 3 o'clock in the afternoon, service thereof is hereby directed to be made by delivering to and leaving with each of the respondents a copy of the writ, together with a copy of this order and the petition for the writ.

G. E. QVALE,
District Judge.

Endorsed: Filed Feb. 10th, 1915. Elias Jacobson, Clerk.

STATE OF MINNESOTA,
County of Chippewa:

In District Court.

THE STATE OF MINNESOTA ex Rel. THE VILLAGE OF CLARA CITY, Relator,
vs.
THE GREAT NORTHERN RAILWAY COMPANY and THE WILLMAR & SIOUX FALLS RAILWAY COMPANY, Respondents.

Writ of Mandamus.

State of Minnesota to the Great Northern Railway Company and Willmar & Sioux Falls Railway Company, Greeting:

Whereas, it manifestly appears to us by the petition of the Village of Clara City:

(Here are set forth verbatim Paragraphs 1 to 11 inclusive of the petition.)

Therefore, you are commanded immediately after the receipt of this writ, to build the sidewalk as ordered in the resolution, mentioned and set forth in the petition, or show cause before this Court at the chambers of Hon. G. E. Qvale, one of the judges of said Court, at the Court House in the City of Willmar, Minnesota, on February 23rd, 1915, at 3 o'clock in the afternoon, why you have not done so and that you then and there make return to this writ with your certificate on such return of having done as you are commanded.

8 Witness, the Honorable G. E. Qvale, Judge of said Court, and the seal thereof this 10th day of February, 1915.

[DISTRICT COURT SEAL.] ELIAS JACOBSON, *Clerk.*

STATE OF MINNESOTA,
County of Chippewa:

In District Court.

THE STATE OF MINNESOTA ex Rel. THE VILLAGE OF CLARA CITY, Relator,
vs.
GREAT NORTHERN RAILWAY COMPANY and WILLMAR & SIOUX FALLS RAILWAY COMPANY, Respondents.

Demurrer to Petition.

Now comes the above named respondents and demur to the petition and writ herein, upon the following grounds:

1. That said petition does not state facts sufficient to constitute a cause of action or ground for a writ of mandamus against these respondents or either of them.

2. That Chapter 78 of the General Laws of Minnesota for 1913, upon which the relator is attempting to rely in this proceeding is null and void, being in violation of the Fourteenth Amendment to the Constitution of the United States and in violation of the constitution of the state of Minnesota in that it is an attempt to deprive these respondents of their property without compensation and without due process of law, and to deny to these respondents the equal protection of the law.

3. That these respondents and each of them are subject to the laws of this state providing for the payment of a gross earnings tax of 5 per cent in lieu of all other taxes and assessments upon their
9 property, and hence the property of these respondents, devoted to railroad use, cannot be assessed or taxed or burdened for the cost of the construction of sidewalks.

4. That it appears from said petition that the relator, The Village of Clara City, if it has any rights whatever in the premises has a complete, adequate and speedy remedy at law for the enforcement thereof and is not entitled to a writ of mandamus to enforce the same.

M. L. COUNTRYMAN AND
T. R. BENTON,
Attorneys for Said Respondents.

203 Great Northern Building, St. Paul, Minnesota.

Endorsed: Filed March 8, 1915. Elias Jacobson, Clerk.

STATE OF MINNESOTA,
County of Chippewa:

District Court, 12th Judicial District.

THE STATE OF MINNESOTA ex Rel. THE VILLAGE OF CLARA CITY, Relator,
GREAT NORTHERN RAILWAY COMPANY and WILLMAR & SIOUX FALLS RAILWAY COMPANY, Respondents.

This cause is before the Court on respondents' demurrer interposed to relator's petition for a writ of mandamus.

It was stipulated and agreed that the petition should be amended in the following respects: By attaching thereto a plat, marked exhibit "A," which shows the right of way, the depot and grounds, the tracks, street, etc., involved in these proceedings.

For the purpose of the demurrer it was admitted by relator
10 that that part of the street in question which is occupied by the road-bed or tracks of the respondents was and is properly, securely and sufficiently planked the full width of the street, such planking extending the full length of the ties and between the tracks as in that particular required by statute; that the sole object and purpose sought to be attained in and by these proceedings is to compel the respondents to construct a sidewalk on one side of the street as it is located across the entire right of way so that the sidewalk will connect with the said planking, in either direction, but not so as to include in such construction the building of any sidewalk or crosswalk along that part of the street now occupied by said roadbed or tracks, which part is already sufficiently and securely planked for crossing purposes.

It was agreed that the demurrer should stand directed against the petition as amended and that the foregoing admissions should be considered in the determination thereof.

Upon the whole, my conclusion is that the demurrer must be sustained and it is so ordered.

Dated March 6th, 1915.

G. E. QVALE.
District Judge.

Endorsed: Filed March 8, 1915. Elias Jacobson, Clerk.

11 STATE OF MINNESOTA ex Rel. VILLAGE OF CLARA CITY, Relator,
vs.
GREAT NORTHERN RAILWAY COMPANY and WILLMAR & SIOUX FALLS RAILWAY COMPANY, Respondents.

Notice of Appeal.

To M. L. Countryman and T. R. Benton, Attorneys for the above named Respondents and to Elias Jacobson, Clerk of said Court:

You Will Please Take Notice, That the above named Relator appeals to the Supreme Court of the State of Minnesota, from order of the said District Court entered herein, on the 6th day of March, A. D. 1915, sustaining the demurrer to the Relator's Petition and from the whole thereof.

Dated this 22nd day of March, A. D. 1915.

FOSNES & FOSNES,
Attorneys for Relator.

Due service admitted this 25th day of March, 1915.

M. L. COUNTRYMAN AND
THOS. R. BENTON,
Attorneys for Respondents.
ELIAS JACOBSON,
Clerk of District Court.

Filed March 26th, 1915. Elias Jacobson, Clerk.

STATE OF MINNESOTA,
County of Chippewa, ss:

In District Court, Twelfth Judicial District.

STATE OF MINNESOTA ex Rel. VILLAGE OF CLARA CITY, Relator,
vs.
GREAT NORTHERN RAILWAY COMPANY and WILLMAR & SIOUX FALLS RAILWAY COMPANY, Respondents.

Whereas, the above named relator appeals to the Supreme Court of the State of Minnesota from an order made in said action on March 6th, 1915, sustaining respondents' demurrer to the petition for the writ of mandamus herein.

Now, therefore, we C. J. Thompson and Ole Norheim, do undertake, promise and agree to and with said respondents that the relator shall pay the costs of said appeal, and the damages sustained by the respondents in consequently thereof, in case the said order or any part thereof is affirmed, or said appeal dismissed, and abide and satisfy the judgment or order which the appellant court may give herein.

Dated this 26th day of March, 1915.

C. J. THOMPSON.
L. O. NORHEIM.

STATE OF MINNESOTA,
County of Chippewa, ss:

On this 26th day of March, 1915, before me, a notary public, within and for said county, personally appeared before me C. J. Thompson and Ole Norheim to me known to be the same persons described in and who executed the foregoing undertaking and each one for himself acknowledged the same to be his own free act and deed.

[NOTARIAL SEAL.] C. A. FOSNES,
Notary Public, Chippewa County, Minn.

My commission expires Jan. 11th, 1922.

12 STATE OF MINNESOTA,
County of Chippewa, ss:

C. J. Thompson and Ole Norheim being duly sworn each for himself on oath says that he is a respondent and freeholder of said County and State. That he is worth the sum of $500.00 over and above his debts and liabilities and exclusive of his property exempt from execution.

C. J. THOMPSON.
L. O. NORHEIM.

Subscribed and sworn to before me this 26th day of March, 1915.

[NOTARIAL SEAL.] C. A. FOSNES,
Notary Public, Chippewa County, Minn.

My commission expires Jan. 11, 1922.

(Endorsed:) The within undertaking and sureties thereon approved this 27th day of March, 1915. G. E. Qvale, Judge. Filed March 29, 1915. Elias Jacobson, Clerk.

STATE OF MINNESOTA,
County of Chippewa, ss:

In District Court, 12th Judicial District.

In the Matter of STATE OF MINNESOTA ex Rel. VILLAGE OF CLARA CITY, Relator,
vs.
GREAT NORTHERN RAILWAY COMPANY and WILLMAR & SIOUX FALLS RAILWAY COMPANY, Respondents.

I, Elias Jacobson, Clerk of the District Court of —— County and State of Minnesota, do hereby certify and return to the honorable the Supreme Court of said State, that I have compared the foregoing and attached paper writing with the original Undertaking on Appeal and Notice of Appeal, in the action above entitled, now remaining of record in my office, and that the same is a true and correct copy and transcript of said original and the whole thereof.

Witness my hand and seal of said Court at Montevideo this 29th day of March, A. D. 1915.

[COURT SEAL.] ELIAS JACOBSON, *Clerk.*

Endorsed: Filed Mar. 30, 1915. I. A. Caswell, Clerk.

13 STATE OF MINNESOTA:

In Supreme Court, April Term, 1915.

STATE OF MINNESOTA ex Rel. VILLAGE OF CLARA CITY, Appellant,
vs.
GREAT NORTHERN RAILWAY COMPANY and WILLMAR & SIOUX FALLS RAILWAY COMPANY, Respondents.

Assignments of Error.

The court erred:

1st. In sustaining the demurrer.

2nd. In holding that the respondents could not be assessed for sidewalk constructed across their property.

3rd. In holding that part of Chapter 78, G. L. 1913, which requires Railway Companies "to construct suitable sidewalks with and correspondent to walks constructed and installed by municipalities or by owners of abutting property" unconstitutional.

FOSNES AND FOSNES,
Attorneys for Appellant.

Endorsed: Filed May 1, 1915. I. A. Caswell, Clerk.

14 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1915.

STATE ex Rel. VILLAGE OF CLARA CITY, Appellant,
vs.
GREAT NORTHERN RAILWAY COMPANY et al., Respondents.

Syllabus.

The legislature, vested with the police power of the state, may require a railroad company to make the street crossings over its right-of-way reasonably safe and convenient for pedestrians.

Chapter 78 Laws of 1913, making it a duty of every railroad company, wherever its right-of-way crosses a public street in a municipality, to construct a suitable sidewalk to connect with and correspond to the walks constructed and installed by the municipality or by the owners of abutting property, is a valid exercise of the police power of the state, and is not to be construed as a disguised attempt to levy a local assessment or tax.

Reversed.

Opinion.

BUNN, *J.:*

The village of Clara City, in Chippewa county, petitioned the district court for a writ of mandamus commanding respondents to build and maintain a sidewalk on the south side of Bunde street across the right of way of respondent and to connect with sidewalks on the street on both sides of the right of way. A temporary writ was issued and served. Respondent demurred to the petition, the demurrer was sustained, and the relator appealed to this court.

The right of way of the railroad companies is 300 feet in width where it is crossed by Bunde street. There are three tracks, all approximately in the middle of the right of way. The station of defendant is immediately north of Bunde street, which is one of the principal streets in the village, and the only street that crosses the right of way. There are business houses on both sides of the right of way, and it is necessary for people doing business in the village to cross the right of way several times a day. The petition alleges that the sidewalk as ordered built by the village council is very essential. It was admitted for the purposes of the demurrer that the part of the street occupied by the roadbed or tracks of the railway companies was and is properly, securely, and sufficiently planked the full width of the street, the planking extending the full length of the ties and between the tracks as required by statute, and that the sole object and purpose sought to be attained by these proceedings is to compel the companies to construct a sidewalk on one side of the street across the entire right of way, so that the sidewalk will connect with the said planking in either direction, but not so as to include in such construction the building of any sidewalk or crosswalk along that part of the street now occupied by the roadbed or tracks, which part is already sufficiently and securely planked for crossing purposes.

The village relies for its right to compel the construction of the sidewalk upon Laws 1913, chapter 78 (Gen. St. 1913, § 4256), which amends R. L. 1905, § 1995, prescribing the duty of railroad companies to construct and maintain grades and planking at street crossings between tracks, by adding, after the requirement that planking shall be placed between all tracks that are not more than 15 feet apart, this language:

"And a suitable sidewalk shall be constructed by said company to connect with and correspond to said walks constructed and installed by the municipality or by owners of abutting property, but cement or concrete construction shall not be required in track space actually occupied by the railroad ties if some substantial and suitable sidewalk material is used in lieu thereof."

A sidewalk is generally regarded as a local improvement, and where a municipality is given authority in the premises it may assess abutting or benefited property for the cost of construction. If such be the only view to be taken of the sidewalk, which, by this proceeding, the defendant is to be required to construct, then the court below rightly sustained the demurrer. For it is the settled law of

this state, as evidenced by numerous decisions, that the statutes providing for a gross earnings tax by railway companies exempt the property of such company that is used for railroad purposes, not only from all general or ordinary taxes, but from all local, special, or extraordinary assessments or charges. First Division St. P. & Pac. R. Co. v. City of St. Paul, 21 Minn. 526; City of St. Paul v. St. P. & S. C. R. Co., 23 Minn. 469; Patterson v. C., R. I. & P. R. Co., 99 Minn. 454, 109 N. W. 993.

[1] But we think a sidewalk over the right of way of a
16 railroad where it crosses a public street in a village or city may be considered from another point of view. The state, in the exercise of its police power, may for the safety, convenience, and welfare of the public require a railroad to maintain its right of way over a street in a reasonably safe condition. Even at common law the burden was cast upon the railroad to maintain that part of the public highway occupied by its tracks and right of way in a proper condition for travel. The syllabus in State ex rel. v. St. Paul & Minn. Transfer Ry. Co., 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656, is:

"At common law the duty rests upon a railway corporation, when it occupies a public thoroughfare with its tracks, to restore the same, by some reasonably safe and convenient means, to its former condition of usefulness. And the duty is a continuing one, and the way must be kept in repair by the corporation whose act has made the duty necessary."

In Chicago & Northwestern Ry. Co. v. Chicago, 140 Ill. 309, 29 N. E. 1109, the question was whether or not, in condemning for a street over a railroad right of way, the expense of constructing and maintaining the street crossing was part of the amount for which compensation was to be awarded the railroad; the statute of Illinois placing the burden upon the railroad to construct and maintain crossings and approaches thereto within its right of way, "so that at all times they should be safe to person and property." The court said:

"Government owes to its citizens the duty of providing and preserving safe and convenient highways. From this duty results the right of public control over public highways. Railroads are public highways. * * * Every railroad company takes its right of way subject to the right of the public to extend the public highways and streets across such right of way. * * * If railroads, so far as they are public highways, are, like other highways, subject to legislative supervision, then railroad companies, in their relations to highways and streets which intersect their rights of way, are subject to the control of the police power of the state. * * * It is proper that the portion of the street or highway which is within the limits of the railroad right of way should be constructed by the railroad company and maintained by it, because of the dangers attending the operation of its road. It should control the making and repairing of the crossing for the protection of those passing along the street and of those riding on the cars. * * * The

items of expense, for which appellant claims compensation, are such only as are involved in its compliance with a police regulation of the statute. * * * Uncompensated obedience to a regulation enacted for the public safety under the police power of the state is not a taking or damaging without just compensation of private property."

The federal Supreme Court, after quoting the above, and more, from the cited Illinois decision, in Chicago, B. & Q. Ry. Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979, adds:

"We concur in these views. The expenses that will be incurred by the railroad company in erecting gates, planking the crossing, and maintaining flagmen, in order that its road may be safely operated, if all that should be required, necessarily result from
17 the maintenance of a public highway, under legislative sanction, and must be deemed to have been taken by the company into account when it accepted the privileges and franchises granted by the state. Such expenses must be regarded as incidental to the exercise of the police powers of the state."

It is now settled that a municipality is impliedly clothed with the police power of the state to the extent that, where the necessity exists, it may compel a railroad corporation at its own expense to carry the street or highway over or under its right of way and maintain the highway in a fit condition for travel. This may include paving and sidewalk, at least so far as the right of way extends. State ex rel. Duluth v. Northern Pac. R. Co., 98 Minn. 429, 108 N. W. 269, and on the second appeal, 99 Minn. 280, 109 N. W. 238, 110 N. W. 975. See, also, State ex rel. v. St. Paul, M. & M. Ry. Co., 98 Minn. 380, 108 N. W. 261, 28 L. R. A. (N. S.) 298, 120 Am. St. Rep. 581, 8 Ann. Cas. 1047, and Chicago, Mil. & St. Paul Ry. Co. v. Minneapolis, 115 Minn. 460, 133 N. W. 169, 51 L. R. A. (N. S.) 236, Ann. Cas. 1912D, 1029, and the opinions affirming these cases in the federal Supreme Court in Northern Pac. R. Co. v. State, 208 U. S. 583, 28 Sup. Ct. 341, 52 L. Ed. 630, St. Paul, M. & M. Ry. Co. v. State, 214 U. S. 497, 29 Sup. Ct. 698, 53 L. Ed. 1060, and Chicago, M. & St. P. Ry. Co. v. Minneapolis, 232 U. S. 430, 34 Sup. Ct. 400, 58 L. Ed. 671. These decisions clearly indicate that the burden of maintaining a reasonably safe and convenient crossing where a street or highway crosses a railroad's right of way is upon the railroad, although such burden, in particular instances, may be exceedingly onerous. It would seem to follow that what may be reasonably incident to this burden, in the way of regulation, is for that authority to prescribe which is exercising the police power of the state.

In the matter of regulation we think that within the tenor of the cited decisions, and others upon the subject, not only the safety, but to some extent the convenience, of the travelers upon the highway may be considered and served; in fact, convenience conduces to safety. Reasonable requirements may properly make distinctions between the manner of constructing and maintaining highway crossings over railroad rights of way in the country, in the village, and in the large city. Another reasonable provision would seem

to be that the maintenance of the highway or street over the railroad right of way ought to correspond somewhat to the manner in which the highway or street is maintained as it joins or approaches the right of way.

[2] It goes without saying that in the Legislature is vested the police power of the state in its fullest amplitude. It is also clear that the statute (section 1995, R. L. 1905), of which chapter 78 of the Laws of 1913 is an amendment, was enacted, in virtue of this police power of the state, to safeguard and facilitate public
18 travel. Unless the statute as amended clearly exceeds this power, it should be sustained.

The statute, in so far as it requires planking, does rightfully, we think, impose an uncompensated burden upon the railroads. The decision to the contrary in State ex rel. St. Paul, M. & M. Ry. Co. v. District Court, 42 Minn. 247, 44 N. W. 7, 7 L. R. A. 121, is virtually overruled by the one in State ex rel. v. St. Paul, M. & M. Ry. Co., 98 Minn. 380, 108 N. W. 261, 28 L. R. A. (N. S.) 298, 120 Am. St. Rep. 581, 8 Ann. Cas. 1047. See, also, Chicago, B. & Q. Ry. Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979, and Chicago, Mil. & St. P. Ry. Co. v. Milwaukee, 97 Wis. 418, 72 N. W. 1118. If planking a public highway where the same crosses the tracks of a railroad may be so connected with public safety and convenience that under the police power of the State the railroad company may be compelled to do it without expense to the public, it would seem to follow that a statute which requires a performance of this duty, burdensome though it be, cannot be said to impose a tax or assessment upon the company.

There can be not controlling difference between the requirement of sidewalk and of planking. Planking is, to be sure, more to prevent persons in vehicles from injury, or the vehicles or teams from damage, by being stalled on the crossing. But, where a crossing is much traveled, safety, to say nothing of convenience, may require a separate space, like a sidewalk, reserved for pedestrians. There is a peculiar peril to travelers on foot, where many vehicles pass and the attention of the drivers is diverted to looking out for trains liable to use the crossing. Again, unless a well-defined walk be provided, there is danger of pedestrians crossing the tracks at places unexpected to those in charge of trains or cars, not to mention the inconvenience where mud and impassable conditions compel those on foot to deviate from the street proper.

It is said defendant, if obligated to lay a sidewalk across its right of way, might likewise be required to construct sidewalks along such right of way where it borders a highway or street. The sufficient answer is that the statute does not call for anything of the kind.

The contention is also that defendant has so much larger right of way than it needs or occupies for its three tracks that for the greater distance the sidewalk, as a safety provision, is out of place. It is to be assumed that the right of way is such only as is needed for and devoted to railway purposes, and such as is rightfully

exempt from taxes and assesments because of the payment of the gross earnings tax. Within its right of way defendant may at any time place additional tracks, or change the location of those it maintains, and, for that reason, it also seems proper that the
19 safety of the passage for the traveler for the whole distance should be placed upon the railroad company. The statute merely prescribes that it shall maintain a sidewalk over its legitimate right of way to correspond and connect with the walk maintained under the supervision of the municipality, so as to afford the pedestrians a reasonably safe and convenient crossing. This regulation does not appear to us to be an unreasonable or arbitrary exercise of the police power of the state. Nor do we consider the same to be a disguised attempt to levy a local assessment. The amendment of 1913 is designed to provide for the pedestrians a safe and convenient passage along the streets of the municipalities, where such streets are occupied and crossed by the tracks and right of way of a railroad company.

This opinion expresses the views of all the members of the court except the writer, who, while readily admitting that a sidewalk across the right of way is a convenience, if not a necessity, is not able to see how it is made so by defendant's ownership or use of the right of way. My own view is that the statute in question is not a valid exercise of the police power.

Order reversed.

BUNN, *J.*

(Endorsed:) Opinion and Syllabus. Filed July 23, 1915. I. A. Caswell, Clerk.

20 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1915.

No. 239.

STATE OF MINNESOTA EX REL. VILLAGE OF CLARA CITY, Appellant,
vs.
GREAT NORTHERN RAILWAY COMPANY and WILLMAR & SIOUX FALLS RAILWAY COMPANY, Respondents.

Pursuant to an order of Court duly made and entered in this cause August 6, A. D. 1915,

It is here and hereby determined and adjudged that the order of the Court below, herein appealed from, to-wit, of the District Court of the Twelfth Judicial District, sitting within and for the County of Chippewa be and the same hereby is in all things reversed. And it is further determined and adjudged that the Appellant above named, do have and recover of said Respondents herein the sum and amount of Sixty-one and 20/100 Dollars, ($61.20), costs and dis-

bursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed August 6, A. D. 1915.

By the Court.

Attest:

I. A. CASWELL, *Clerk.*

Statement for Judgment.

Statutory Costs, $25.00; Printer, $19.50; Clerk, $10.00; Acknowledgements, $.50; Return, $6.20; Postage and Express, $—; Filing Mandate, $—. Total, $61.20.

21 STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul, August 6, A. D. 1915.

[COURT SEAL.] I. A. CASWELL, *Clerk.*

State of Minnesota, Supreme Court. Transcript of Judgment Filed August 6, A. D. 1916. I. A. Caswell, Clerk.

22 No. 19365. State of Minnesota, Supreme Court. State ex rel. Village of Clara City, Appellant, vs. Great Northern Railway Company et al., Respondents. Judgment Roll. Filed August 6, 1915. I. A. Caswell, Clerk.

23 STATE OF MINNESOTA,
Supreme Court, ss:

Mandate.

The State of Minnesota to the Honorable Judge and Officers of the District Court of the Twelfth Judicial District Sitting within and for the County of Chippewa, Greeting:

Whereas, Lately in your Court, in an action therein pending, between State of Minnesota ex rel. Village of Clara City, Relator and Great Northern Railway Company and Willmar & Sioux Falls Railway Company, Respondents, a certain order was entered therein March 6, 1915, from which action of your Court an appeal thereafter was taken to this Court:

And whereas, The said cause came on to be heard before our Supreme Court, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged

by this Court that the order of the Court below herein appealed from, be, and the same hereby is, in all things reversed and that judgment be entered accordingly. A copy of the entry of Judgment thereupon in this Court is herewith transmitted and made part of this Remittitur.

Now, Therefore, This Mandate is to you directed and certified, to inform you of these proceedings had in our Supreme Court, in said hereinbefore mentioned cause, and the same is hereby and herewith remanded to your Court for such other or further record and proceedings therein as may be by law necessary, just and proper, under and by virtue of the said order herein made.

Witness, The Honorable Calvin L. Brown, Chief Justice of the Supreme Court aforesaid, and the seal of said Court at St. Paul, this 6th day of August, 1915.

[COURT SEAL.]

I. A. CASWELL,
Clerk of the Supreme Court.
By —— ——, *Deputy.*

[Endorsed:] Filed. Elias Jacobson, Clerk.

24 STATE OF MINNESOTA,
County of Chippewa:

District Court, Twelfth Judicial District.

STATE OF MINNESOTA ex rel. VILLAGE OF CLARA CITY, Relator,
vs.
GREAT NORTHERN RAILWAY COMPANY and WILLMAR & SIOUX FALLS RAILWAY COMPANY, Respondents.

To M. L. Countryman and T. R. Benton, Attorneys for Respondents.

SIRS: Please take notice, That the above cause will be brought to a hearing on the demurrer as return to the writ of mandamus herein, before Hon. G. E. Qvale, one of the judges of said Court, at his Chambers, at the Court House in the City of Willmar, Minnesota, on the 31st day of August, 1915, at 3 o'clock P. M., or as soon thereafter as counsel can be heard, at which time the relator will ask for an order for judgment as prayed for in its petition; that all the papers on file in said cause will be used upon the hearing of said motion which will then be made, upon the ground that the order sustaining respondent's demurrer has been reversed by the Supreme Court, and that the relator is entitled to an order for judgment.

Yours respectfully,

FOSNES & FOSNES,
Attorneys for Relator.

Filed Sept. 15, 1915. Elias Jacobson, Clerk.

3—510

Due service of the within is hereby admitted this 19th day of Aug. 1915.

M. L. COUNTRYMAN,
T. R. BENTON,
Att'ys for Def't.

STATE OF MINNESOTA,
County of Chippewa:

District Court, 12th Judicial District.

STATE OF MINNESOTA ex Rel. VILLAGE OF CLARA CITY, Relator,
vs.
GREAT NORTHERN RAILWAY COMPANY and WILLMAR & SIOUX FALLS RAILWAY COMPANY, Respondents.

This cause is before the Court on motion of the relator for an order for judgment as prayed for in the petition.

Messrs. Fosnes & Fosnes appeared in support of the motion, and no one appeared in opposition thereto. Due proof of service of notice of the motion was filed, as was also a letter directed to the relator's attorneys by the General Attorney of the respondents to the effect that no appearance in opposition to the motion would be made.

Therefore, because of respondents' default and conformable to the law of the case as laid down by the Supreme Court in its opinion reversing the order of this Court sustaining the demurrer to the petition herein,

It is ordered, that the motion be and the same hereby is granted, and judgment will be entered in favor of the relator for the specific relief prayed for in its petition, with taxable costs and disbursements.

Dated September 11th, 1915.

G. E. QVALE, *Judge.*

Filed Sept. 13, 1915. Elias Jacobson, Clerk.

STATE OF MINNESOTA,
County of Chippewa:

District Court, Twlefth Judicial District.

STATE OF MINNESOTA ex Rel. VILLAGE OF CLARA CITY, Relator,
vs.
GREAT NORTHERN RAILWAY COMPANY and WILLMAR & SIOUX FALLS RAILWAY COMPANY, Respondents.

This cause came on to be heard at Willmar, Minnesota, on February 23, 1915, upon the petition of the relator herein and the demurrer thereto interposed by the respondents, and the issues raised by said demurrer having been submitted to and tried by the Court, and the Court having filed its findings of fact and conclusions of

law sustaining the demurrer, from which an appeal was taken to the Supreme Court, which Court on July 23, 1915, reversed the order of the Court sustaining the demurrer, and having filed its mandate in this Court reversing the action of the District Court from which an appeal was taken, and the District Court having subsequently determined as conclusions of law that the relator is entitled to a peremptory writ of mandamus as prayed for in the petition, and as herein adjudged.

Now upon motion of Fosnes & Fosnes, attorneys for said relator, it is Adjudged, Decreed and Determined that the relator do have and recover of the respondents the sum of Thirty and 90/100
26 Dollars, taxed as costs of this action, and that the relator have execution therefor.

It is further Adjudged, Decreed and Determined that the petitioner have a peremptory writ of mandamus, and the same do issue forthwith, directed to and commanding said respondents, The Great Northern Railway Company and Willmar & Sioux Falls Railway Company, upon the pain and peril that shall fall thereon for refusal, that they construct and build a cement sidewalk on the south side of Bonde Street from Spicer Avenue lying west of the right of way easterly on Bonde Street to Bell Avenue, on the east side of the right of way, and to connect with sidewalks built across Spicer and Bell Avenues, and that said sidewalk be built six feet wide, in the following manner and of the following material: Foundation shall consist of a layer of sand and gravel not less than six inches deep, and must be thoroughly rammed or tamped with suitable tools satisfactory to the Council, bed to consist of a layer two inches in depth, composed of Portland cement one part, and six parts of sand, to be thoroughly mixed while dry, the mixture shall then be wet sufficiently to make it of the proper consistency for a bed for the surface, the surface shall be laid before the cement of the bed sets, the bed to be so prepared as to present an even and uniform surface, the surface to consist of a layer of one-half inch thickness, composed of one part of Portland cement, and two parts of good sharp sand, surface to be smooth and finished to grade established by the Council, but cement or concrete construction shall not be required in track space actually occupied by the railroad ties if some substantial and suitable sidewalk material is used in lieu thereof.

Oct. 2, 1915.

By the Court:

ELIAS JACOBSON, *Clerk.*

Filed Oct. 2nd, 1915. Elias Jacobson, Clerk.

27 STATE OF MINNESOTA,
County of Chippewa, ss:

District Court, Twelfth Judicial District.

STATE OF MINNESOTA ex Rel. VILLAGE OF CLARA CITY, Relator,
vs.
GREAT NORTHERN RAILWAY COMPANY and THE WILLMAR AND SIOUX FALLS RAILWAY COMPANY, Respondents.

Notice of Appeal.

To Messrs. Fosnes & Fosnes, Attorneys for the above named Relator, and to Elias Jacobson, Clerk of said District Court:

Please take notice that the above named respondents, Great Northern Railway Company and The Willmar and Sioux Falls Railway Company, appeal to the Supreme Court of the State of Minnesota from the judgment of the said District Court, entered herein on the 2nd day of October, 1915, and from the whole thereof.

Dated the 30th day of October, 1915.

M. L. COUNTRYMAN AND
THOS. R. BENTON,
Attorneys for Respondents, Great Northern Railway Company and The Willmar and Sioux Falls Railway Company.

Bond on Appeal is hereby waived and it is stipulated that all proceedings in this action shall be stayed until the final determination of this appeal.

Dated the 1st day of November, 1915.

FOSNES & FOSNES,
Attorneys for Relator.

Endorsed: Due and personal service of the within is hereby admitted this 1st day of November 1915. Fosnes & Fosnes, Att'ys for Relator. Elias Jacobson, Clerk of Dist. Court. Filed Nov. 12th 1915. Elias Jacobson, Clerk.

28 STATE OF MINNESOTA,
County of Chippewa, ss:

District Court, 12th Judicial District.

STATE OF MINNESOTA ex Rel. VILLAGE OF CLARA CITY, Relator,
vs.
GREAT NORTHERN RAILWAY COMPANY and THE WILLMAR AND SIOUX FALLS RAILWAY COMPANY, Respondents.

Clerk's Certificate.

I, Elias Jacobson, Clerk of the above named Court do hereby certify that I have compared the papers, to which this certificate

is attached, with the original Notice of Appeal to Supreme Court with proof of service with Stipulation waiving Bond of Appeal as the same appears of record and on file in the said clerk's office, at the Court House in said County in the above entitled cause, and that the same is a true and correct copy thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Montevideo this 10th day of February A. D. 1916.

[COURT SEAL.] ELIAS JACOBSON, *Clerk.*

Endorsed: Filed Mar. 2 1916. I. A. Caswell, Clerk.

29 STATE OF MINNESOTA:

Supreme Court, April Term.

No. 81.

STATE OF MINNESOTA ex Rel. VILLAGE OF CLARA CITY, Respondent,
vs.
GREAT NORTHERN RAILWAY COMPANY and WILLMAR & SIOUX FALLS RAILWAY COMPANY, Appellants.

Assignments of Error.

1. The court erred in entering judgment in favor of relator and against these appellants, in this: That by the laws of the State of Minnesota, appellants are required to pay and do pay into the Treasury of the said state five percentum of the gross earnings of their lines of railway in said state and by such payment are exempted from all liability for the construction of sidewalks or other improvements on streets abutting upon their property used for railway purposes.

2. The court erred in entering judgment requiring these appellants to construct the sidewalk described in the said judgment, in this: That Chapter 78, General Laws of 1913, as enforced by the order for judgment and the judgment entered in this proceeding, impairs the obligation of the contract between the State of Minnesota and these appellants arising from the gross earnings tax laws of the said state, in violation of the constitution of the State of Minnesota and Section ten, Article one of the constitution of the United States.

3. The court erred in entering judgment requiring these appellants to construct the sidewalk described in the said judgment, in this: That Chapter 78, General Laws of 1913, as enforced by the order for judgment and the judgment entered in this proceeding deprives these appellants of their property without due process of law and denies to them the equal protection of the law in violation

of Section one, Article fourteen of the constitution of the United States.

M. L. COUNTRYMAN,
THOS. R. BENTON,
Attorneys for Appellants.

Endorsed: Filed Apr. 10, 1916. I. A. Caswell, Clerk.

30 STATE OF MINNESOTA:

Supreme Court, April Term, 1916.

No. 81.

STATE OF MINNESOTA ex Rel. VILLAGE OF CLARA CITY, Respondent,
vs.
GREAT NORTHERN RAILWAY COMPANY and WILLMAR & SIOUX FALLS RAILWAY COMPANY, Appellants.

Stipulation.

The appellants above named hereby stipulate and agree with counsel for relator and respondent that this cause shall be submitted for the final decision of the court upon the record heretofore filed and served and upon the brief heretofore filed in the case on the former appeal and upon the assignments of error made and filed on this appeal from the judgment of the district court entered in the cause.

Dated April 7, 1916.

M. L. COUNTRYMAN &
THOS. R. BENTON,
Attorneys for Appellants, Great Northern Railway Company and Willmar & Sioux Falls Railway Company;
FOSNES & FOSNES,
Attorneys for Relator and Respondent.

Endorsed: Filed Apr. 10, 1916. I. A. Caswell, Clerk.

31 STATE ex Rel. VILLAGE OF CLARA CITY, Respondent,
vs.
GREAT NORTHERN RY. CO. et al., Appellants.

Per Curiam:

Appeal by defendant railway companies from a judgment of of the district court of Chippewa county commanding them to build and maintain a sidewalk in the village of Clara City on the south side of Bunde street across the right of way of defendants, to connect with sidewalks on each side of the right of way. The case was here before on an appeal by relator from an order sustaining a de-

murrer to the complaint, and is reported in 130 Minn. 480. We adhere to the views expressed in the opinion on the former appeal. As no question is presented on the present appeal that was not decided when the case was here before, the result is that the judgment appealed from must be affirmed.

So ordered.

Endorsed: Filed April 21, 1916. I. A. Caswell, Clerk.

32 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1916.

No. 81.

STATE OF MINNESOTA ex Rel. VILLAGE OF CLARA CITY, Respondent,
vs.
GREAT NORTHERN RAILWAY COMPANY and THE WILLMAR AND SIOUX FALLS RAILWAY COMPANY, Appellants.

Pursuant to an order of Court duly made and entered in this cause April 20 A. D. 1916 it is here and hereby determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court of the Twelfth Judicial District, sitting within and for the County of Chippewa be and the same hereby is in all things affirmed.

Dated and signed May 16 A. D. 1916.

By the Court.

Attest:

I. A. CASWELL, *Clerk.*

33 STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul May 16 A. D. 1916.

[COURT SEAL.] I. A. CASWELL, *Clerk.*

State of Minnesota, Supreme Court. Transcript of Judgment. Filed May 16 A. D. 1916. I. A. Caswell, Clerk.

34 No. 19805. State of Minnesota, Supreme Court. State ex rel. Village of Clara City, Respondent, vs. Great Northern Railway Company, et al., Appellants. Judgment Roll. Filed May 16 1916. I. A. Caswell, Clerk.

35 STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of State of Minnesota, ex rel. Village of Clara City, vs. Great Northern Railway Company and Willmar and Sioux Falls Railway Company and also of the opinions of the court rendered therein together with the assignments of errors, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in St. Paul, Minnesota, this 5th day of June, 1916.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

36 Supreme Court of the United States.

GREAT NORTHERN RAILWAY COMPANY and WILLMAR & SIOUX FALLS RAILWAY COMPANY, Plaintiffs in Error,
vs.
STATE OF MINNESOTA ex Rel. VILLAGE OF CLARA CITY, Defendant in Error.

Assignment of Errors.

Come now the Great Northern Railway Company and Willmar & Sious Falls Railway Company, plaintiff in error, and make and file this their assignment of errors:

1. The Supreme Court of Minnesota erred in affirming the judgment entered in the District Court of the County of Chippewa, in said state, in favor of defendant in error and against these plaintiffs, in this: That by the laws of the said state of Minnesota, plaintiffs in error are required to pay and do pay into the Treasury of the said state five per centum of the gross earnings of their lines of railway in said state and upon such payment are by the said laws exempted from all liability for the construction of sidewalks or other improvements on streets abutting upon their property used for railway purposes.

2. The Supreme Court of Minnesota erred in deciding and adjudging that Chapter 78, Laws of 1913, is not a disguised attempt to levy a local assessment or tax in violation of the gross earnings tax laws of said state.

37 3. The Supreme Court of Minnesota erred in affirming the judgment entered in the said district Court requiring these plaintiffs in error to construct the sidewalk described in the said judgment, in this: That Chapter 78, Laws of 1913, as enforced by the order for judgment and the judgment entered in this proceeding impairs the obligation of the contract between the State of Minnesota

al plaintiffs in error arising from their respective charters and the gross earnings tax laws of the said state in violation of Section 10, Article 1 of the constitution of the United States.

4. The Supreme Court of Minnesota erred in affirming the judgment entered in the said district court requiring plaintiffs in error to construct the sidewalk described in the said judgment, in this: That Chapter 78, Laws of 1913, as enforced by the order for judgment and the judgment entered in this proceeding deprives plaintiffs in error of their property without due process of law and denies to them the equal protection of the law in violation of Section One, Article Fourteen of the Constitution of the United States.

5. The Supreme Court of Minnesota erred in deciding and adjudging that Chapter 78, Laws of 1913, is a valid exercise of the police power of the state.

Wherefore, for these and other manifest errors appearing in the record, the said Great Northern Railway Company and Willmar & Sioux Falls Railway Company, plaintiffs in error, pray that the judgment of the said Supreme Court of the State of Minnesota be reversed and set aside and held for naught, and that judgment be rendered for plaintiffs in error granting them their rights under the
38 constitution and statutes of the United States, and plaintiffs in error also pray for judgment for their costs.

E. C. LINDLEY,
Attorney for Great Northern Railway Company and Willmar & Sioux Falls Railway Company, Plaintiffs in Error.

38½ [Endorsed:] 19805. Assignment Errors. Filed May 18, 1916. I. A. Caswell, Clerk.

39 In the Supreme Court of the State of Minnesota.

STATE OF MINNESOTA ex Rel. VILLAGE OF CLARA CITY, Respondent,
vs.
GREAT NORTHERN RAILWAY COMPANY and WILLMAR AND SIOUX FALLS RAILWAY COMPANY, Appellants.

To the Honorable Justices of the Supreme Court of the State of Minnesota:

Your petitioners, the above named Great Northern Railway Company and Willmar & Sioux Falls Railway Company, respectfully show that on the 16th day of May, 1916, the Supreme Court of the State of Minnesota rendered a final judgment against your petitioners in a certain case wherein your petitioners were appellants and the State of Minnesota, ex rel. Village of Clara City was relator and respondent, as will appear by reference to the record and proceedings in said case, and that the said court is the highest court of law or equity in said state in which a decision in the said suit could be had; that by the said suit there was drawn in question the validity of a statute of or an authority exercised under said state

on the ground of their being repugnant to the constitution, treaties, or the laws of the United States, and the decision was in favor of their validity, all of which will more fully appear in detail from the assignment of errors filed herein.

Wherefore, the said Great Northern Railway Company and Willmar and Sioux Falls Railway Company pray that a writ of error may issue to the Supreme Court of the State of Minnesota for the correcting of the error complained of, and that a duly authenticated transcript of the record, proceedings and papers therein may
40 be sent to the Supreme Court of the United States.

GREAT NORTHERN RAILWAY COMPANY,
WILLMAR & SIOUX FALLS RAILWAY COMPANY,
By E. C. LINDLEY,
Attorney for Appellants.

40½ [Endorsed:] 19805. Petition for Writ. Filed May 18, 1916. I. A. Caswell, Clerk.

41 In the Supreme Court of the State of Minnesota.

STATE OF MINNESOTA ex Rel. VILLIAGE OF CLARA CITY, Respondent,
vs.
GREAT NORTHERN RAILWAY COMPANY & WILLMAR & SIOUX FALLS RAILWAY COMPANY, Appellants.

Comes now the Great Northern Railway Company and Willmar and Sioux Falls Railway Company, the appellants above named, on this 16th day of May, 1916, and file and present to this court their petition praying for the allowance of a writ of error intended to be urged by it, and praying further that the duly authenticated transcript of the record, proceedings and papers upon which the judgment herein was rendered may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had in the premises as may be just and proper; and upon consideration of the said petition, this court, desiring to give the petitioners an opportunity to test in the Supreme Court of the United States the question herein presented,

It is ordered by this court that a writ of error be allowed as prayed, provided however, that the said Great Northern Railway Company and Willmar & Sioux Falls Railway Company, appellants, give bond according to law in the sum of Five Hundred Dollars ($500.00), which bond shall operate as a supersedeas bond.

In testimony whereof, witness my hand this 16th day of May, 1916.

CALVIN L. BROWN,
Chief Justice of the Supreme Court of the State of Minnesota.

41½ [Endorsed:] 19805. Order for Writ. Filed May 18, 1916. I. A. Caswell, Clerk.

42 Know all men by these presents, that we, Great Northern Railway Company, a corporation of the State of Minnesota, and Willmar & Sioux Falls Railway Company, a corporation of the State of Minnesota, as principals, and National Surety Company, a corporation of the State of New York, as surety, are held and firmly bound unto the State of Minnesota and the Village of Clara City, a municipal corporation of the said state of Minnesota, as their respective interests may appear, in the sum of Five Hundred Dollars ($500.00) to be paid to the said obligees, their successors and assigns, for the payment of which well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 16th day of May, 1916.

Whereas, lately in the Supreme Court of the State of Minnesota, in a suit pending in said Court wherein the State of Minnesota, ex rel. Village of Clara City was Relator and Respondent, and Great Northern Railway Company and Willmar & Sioux Falls Railway Company were appellants, judgment was entered against the said appellants and said appellants seek to prosecute their writ of error in the Supreme Court of the United States to reverse the judgment rendered in the said suit.

Now therefore, the condition of this obligation is such that if the above named appellants, Great Northern Railway Company and Willmar & Sioux Falls Railway Company, shall prose-
43 cute their said writ of error to effect and pay all costs and damages, if they shall fail to make good their plea, then this obligation to be void, otherwise to remain in full force and effect.

GREAT NORTHERN RAILWAY COMPANY,
By W. P. KENNEY, *Vice-President.* L. D. N. 5/8.
[CORPORATE SEAL.]

Attest:
L. E. KATZENBACH, *Secretary.*

Executed in the presence of:
LEWIS D. NEWMAN.
G. E. MILLER.

WILLMAR & SIOUX FALLS RAILWAY COMPANY,
By E. C. LINDLEY, *President.*

Attest:
L. E. KATZENBACH, *Secretary.*
[CORPORATE SEAL.]

THOS. R. BENTON.
G. E. MILLER.

NATIONAL SURETY COMPANY,
By W. S. McCURDY, *Its Attorney in Fact.*
[CORPORATE SEAL.]

EVAR CEDARLEAF.
HARRY McCOOL.

44 STATE OF MINNESOTA,
County of Ramsey, ss:

On this 16th day of May, 1916, before me appeared W. P. Kenney, to me personally known, who, being by me duly sworn, did say that he is Vice-President of Great Northern Railway Company; that the seal affixed to the foregoing instrument is the corporate seal of said corporation and that said instrument was executed on behalf of said corporation by authority of its Board of Directors and said W. P. Kenney acknowledged said instrument to be the free act and deed of said corporation.

[NOTARIAL SEAL.] GUSTAVE E. WALBERT,
Notary Public, Ramsey County, Minnesota.

My commission expires June 7, 1919.

STATE OF MINNESOTA,
County of Ramsey, ss:

On this 16th day of May, 1916, before me appeared E. C. Lindley, to me personally known, who being by me duly sworn, did say that he is the President of Willmar & Sioux Falls Railway Company; that the seal affixed to the foregoing instrument is the corporate seal of said corporation and that said instrument was executed on behalf of said corporation by authority of its Board of Directors and said E. C. Lindley acknowledged said instrument to be the free act and deed of said corporation.

[NOTARIAL SEAL.] GUSTAVE E. WALBERT,
Notary Public, Ramsey County, Minnesota.

My commission expires June 7, 1919.

45 STATE OF MINNESOTA,
County of Ramsey, ss:

On this 16th day of May, 1916, before me appeared W. S. McCurdy, to me personally known, who being by me duly sworn, did say that he is attorney in fact of the National Surety Company; that the seal affixed to the foregoing instrument is the corporate seal of the said corporation, and that said instrument was executed on behalf of said corporation by authority of its Board of Directors and said W. S. McCurdy acknowledged said instrument to be the free act and deed of said corporation.

[NOTORIAL SEAL.] EVAR CEDARLEAF,
Notary Public, Ramsey County, Minnesota.

My commission expires June 2nd, 1920.

The foregoing and within bond is on this 16th day of May, 1916, approved.

CALVIN L. BROWN,
Chief Justice of the Supreme Court of the State of Minnesota.

45½ [Endorsed:] Copy of Bond.

46 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Supreme Court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Supreme Court of the State of Minnesota, before you, or some of you, being the highest court of law or equity of the said state, in which a decision could be had in the said suit of the State of Minnesota, ex rel. Village of Clara City, Relator, and Great Northern Railway Company and Willmar and Sioux Falls Railway Company, Appellants, wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity, a manifest error hath happened, to the great damage of the said Great Northern Railway Company and Willmar and Sioux Falls Railway Company as by their complaint appears. We being willing that error, if any hath been, shall be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of
47 the United States this 17th day of May, in the year of our Lord, One Thousand Nine Hundred and Sixteen.

Done in the City of St. Paul, County of Ramsey, State of Minnesota, with the seal of the District Court of the United States for the District of Minnesota attached.

[Seal U. S. Dist. Court, Dist. of Minnesota, Third Division.]

CHARLES L. SPENCER,
Clerk of the District Court of the United States for the District of Minnesota.

Allowed by:
CALVIN L. BROWN,
Chief Justice of the Supreme Court of the State of Minnesota.

47½ [Endorsed:] 19805. Writ. Filed May 18, 1916. I. A. Caswell, Clerk.

48 STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, clerk of the said court, do hereby certify that there was lodged with me as such clerk on May 18, 1916, in the matter

of State of Minnesota ex rel. Village of Clara City, vs. Great Northern Railway Company and Willmar & Sioux Falls Railway Company—

1. The original bond of which a copy is herein set forth;

2. Copies of the writ of error, as herein set forth,—one for each defendant and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in St. Paul, Minnesota, this 5th day of June, 1916.

[Seal Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

49 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the State of Minnesota, ex rel. Village of Clara City, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C. within thirty (30) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Minnesota, wherein the Great Northern Railway Company and Willmar and Sioux Falls Railway Company are Plaintiffs in Error, and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiffs in Error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Calvin L. Brown, Chief Justice of the Supreme Court of the State of Minnesota this 18th day of May, 1916.

CALVIN L. BROWN,
Chief Justice of the Supreme Court of the State of Minnesota.

Due and personal service of the foregoing citation is hereby admitted this 22 day of May, 1916, at Montevideo, in the County of Chippewa, State of Minnesota.

FOSNES & FOSNES,
Attorneys for said Defendant in Error, State of Minnesota ex Rel. Village of Clara City.

49½ [Endorsed:] 19805. Filed May 25, 1916. I. A. Caswell, Clerk.

50 Supreme Court of the United States.

GREAT NORTHERN RAILWAY COMPANY and WILLMAR & SIOUX FALLS RAILWAY COMPANY, Plaintiffs in Error,
vs.
STATE OF MINNESOTA, ex Rel. VILLAGE OF CLARA CITY, Defendant in Error.

Præcipe for Return of Record.

To the Clerk of the Supreme Court of the State of Minnesota:

In making your return to the Supreme Court of the United States in the above entitled cause, you will please include the entire record as returned to the Supreme Court of Minnesota in the appeal to said court from the District Court, including the map "Exhibit A" and including the decisions of said Supreme Court on both of the appeals to said court and the record of all proceedings therein in said Supreme Court of Minnesota.

E. C. LINDLEY,
Attorney for Plaintiffs in Error.

Dated this 18th day of May, 1916.

Due and personal service of the above præcipe by true copy thereof is hereby admitted at Montevideo, Minnesota, this 22 day of May, 1916.

FOSNES & FOSNES,
Attorneys for Defendant in Error.

50½ [Endorsed:] 19805. Filed May 25, 1916. I. A. Caswell, Clerk.

51 UNITED STATES OF AMERICA,
Supreme Court of Minnesota, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Minnesota, at my office, in the city of St. Paul, Minnesota, this 5th day of June, 1916.

[Seal Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

Endorsed on cover: File No. 25,340. Minnesota Supreme Court. Term No. 510. Great Northern Railway Company and Willmar and Sioux Falls Railway Company, plaintiffs in error, vs. The State of Minnesota ex Rel. Village of Clara City. Filed June 6th, 1916. File No. 25,340.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. [redacted] 185

GREAT NORTHERN RAILWAY COMPANY and WILLMAR AND SIOUX FALLS RAILWAY COMPANY,

Plaintiffs in Error,

vs.

THE STATE OF MINNESOTA EX REL. VILLAGE OF CLARA CITY,

Defendant in Error.

In Error to the Supreme Court of the State of Minnesota.

M. L. COUNTRYMAN and THOS. R. BENTON,
Attorneys for Plaintiffs in Error,

E. C. LINDLEY,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 510.

GREAT NORTHERN RAILWAY COMPANY and WILLMAR AND SIOUX FALLS RAILWAY COMPANY,

Plaintiffs in Error,

vs.

THE STATE OF MINNESOTA EX REL. VILLAGE OF CLARA CITY,

Defendant in Error.

In Error to the Supreme Court of the State of Minnesota.

STATEMENT OF FACTS.

This writ of error brings up for review a judgment of the Supreme Court of Minnesota, affirming a judgment of the District Court of Chippewa County, Minnesota, in a mandamus suit brought upon the relation of the Village of Clara City to compel the defendant railway companies to construct a cement sidewalk upon and along the south side

of Bonde Street in that village for a distance of 300 feet, extending from the east to the west side of defendants' right of way, which is 300 feet wide where Bonde Street crosses it. Attached to the petition is a plat showing the right of way in red lines, and the location of the proposed sidewalk in Bonde Street is shown by dotted lines. The defendants demurred to the petition. (Record page 6.) The District Court sustained the demurrer, (Record page 7) and the relator appealed to the Supreme Court. That court reversed the order, 130 Minn. 408. The case went back to the District Court, where the defendants elected to stand upon their demurrer, and judgment was entered directing the issuance of a peremptory writ of mandamus. (Record page 18.) Defendants appealed from that judgment to the State Supreme Court, where the judgment was sustained. (Record page 22.)

By General Statutes, Minnesota, Revision of 1913, Section 4256, railroad companies are required to construct and maintain in good repair and free from snow or other obstruction wherever any railroad track shall cross a public road, a sufficient crossing consisting of (1) sufficient grades 16 feet in width on each side of the center of such road and of such slope as may be deemed necessary by the officers having charge of the public road; (2) a plank covering of the same width, securely spiked, extending the full length of the ties; the planks not more than 1 inch apart; planking not more than 2½ inches from the rail and the surface thereof on a level with the top of the rail; (3) in municipalities such grades and planking shall extend the full width of the street or of that part thereof graded or used for travel, and like planking shall be placed between all tracks which are not more than 15 feet apart.

The foregoing has been the statutory requirement in Minnesota for many years, and it is conceded that the defendant companies have fully complied therewith.

> "For the purpose of the demurrer it was admitted by relator that that part of the street in question which is occupied by the roadbed or tracks of the respondents was and is properly, securely and sufficiently planked the full width of the street, such planking extending the full length of the ties and between the tracks as in that particular required by statute; that the sole object and purpose sought to be attained in and by these proceedings is to compel the respondents to construct a sidewalk on one side of the street as it is located across the entire right of way, so that the sidewalk will connect with the said planking in either direction, but not so as to include in such construction the building of any sidewalk or crosswalk along that part of the street now occupied by said roadbed or tracks, which part is already sufficiently and securely planked for crossing purposes." (Record page 7.)

In 1913 the legislature amended Section 4256 of the General Laws by adding the following requirement:

> "And a suitable sidewalk shall be constructed by said company to connect with and correspond to sidewalks constructed and installed by the municipality or by owners of abutting property, but cement or concrete construction shall not be required in track space actually occupied by the railroad ties, if some substantial and suitable sidewalk material is used in lieu thereof." Laws of Minnesota 1913, Chapter 78, Section 1.

The village relies upon the above amendment of 1913 for its right to compel the construction of the sidewalk across the right of way. It was and is the contention of the railway companies that the amendment of 1913 is not a valid exercise of the police power, but is an unconstitutional attempt by the legislature to impose upon railroad companies the burden of special assessments for municipal side-

walks, contrary to the provisions of the Railroad Gross Earnings Tax Law of the State of Minnesota, which is as follows:

> General Statutes 1913, Section 2256. "Every railroad company owning or operating any line of railroad situated within, or partly within, this state, shall during the year 1913, and annually thereafter, pay into the treasury of this state in lieu of all taxes and assessments upon all property within this state owned or operated for railway purposes by such company, including equipment, appurtenances, appendages and franchises thereof, a sum of money equal to five per cent of the gross earnings derived from the operation of such line of railway within this state."

By Article IV, Section 32a of the Constitution of Minnesota any law providing for the repeal or amendment of any railroad gross earnings tax law shall, before the same shall take effect, or be in force, be submitted to a vote of the people and be adopted and ratified by a majority of the electors of the state voting at the election at which the same shall be submitted to them. Chapter 78, Laws 1913, was not submitted to the voters.

The gist of the decision of the Supreme Court of Minnesota is stated in a syllabus, prepared by the court, in the following language:

> "The legislature, vested with the police power of the state, may require a railroad company to make the street crossings over its right of way reasonably safe and convenient for pedestrians.
>
> Chapter 78, Laws of 1913, making it a duty of every railroad company, wherever its right of way crosses a public street in a municipality, to construct a suitable sidewalk to connect with and correspond to the walks constructed and installed by the municipality or by the owners of abutting property, is a valid exercise of the police power of the state, and is not to be construed as a disguised attempt to levy a local assessment or tax."

The writer of the court's opinion (Bunn, J.) dissented from the views of the majority, as shown by the closing paragraph of that opinion, in which he said:

> "This opinion expresses the views of all the members of the court except the writer, who, while readily admitting that a sidewalk across the right of way is a convenience, if not a necessity, is not able to see how it is made so by defendant's ownership or use of the right of way. My own view is that the statute in question is not a valid exercise of the police power."

ASSIGNMENTS OF ERROR.

I.

The Supreme Court of Minnesota erred in affirming the judgment entered in the District Court of the County of Chippewa, in said state, in favor of defendant in error and against these plaintiffs, in this: That by the laws of the said state of Minnesota, plaintiffs in error are required to pay and do pay into the Treasury of the said state five per centum of the gross earnings of their lines of railway in said state and upon such payment are by the said laws exempted from all liability for the construction of sidewalks or other improvements on streets abutting upon their property used for railway purposes.

II.

The Supreme Court of Minnesota erred in deciding and adjudging that Chapter 78, Laws of 1913, is not a disguised attempt to levy a local assessment or tax in violation of the gross earnings tax laws of said state.

III.

The Supreme Court of Minnesota erred in affirming the judgment entered in the said district court requiring these plaintiffs in error to construct the sidewalk described in the said judgment, in this: That Chapter 78, Laws of 1913, as enforced by the order for judgment and the judgment entered in this proceeding impairs the obligation of the contract between the State of Minnesota and plaintiffs in error arising from their respective charters and the gross earnings tax laws of the said state in violation of

Section 10, Article 1 of the constitution of the United States.

IV.

The Supreme Court of Minnesota erred in affirming the judgment entered in the said district court requiring plaintiffs in error to construct the sidewalk described in the said judgment, in this: That Chapter 78, Laws of 1913, as enforced by the order for judgment and the judgment entered in this proceeding deprives plaintiffs in error of their property without due process of law and denies to them the equal protection of the law in violation of Section One, Article Fourteen of the Constitution of the United States.

V.

The Supreme Court of Minnesota erred in deciding and adjudging that Chapter 78, Laws of 1913, is a valid exercise of the police power of the state.

ARGUMENT.

I.

THE MINNESOTA GROSS EARNINGS TAX LAW EXEMPTS RAILROAD PROPERTY USED FOR RAILROAD PURPOSES FROM ALL FORMS OF SPECIAL ASSESSMENTS, INCLUDING ASSESSMENTS FOR THE COST OF SIDEWALKS.

We have quoted the provisions of the Gross Earnings Tax Law in the statement of facts and it will not be necessary to here repeat them. It will be noted that the payment of gross earnings taxes is expressly declared to be "in lieu of all taxes and assessments." The construction of that statute, which has become the settled law in Minnesota, is clearly stated by the Supreme Court in its opinion in the present case.

> "A sidewalk is generally regarded as a local improvement, and where a municipality is given authority in the premises, it may assess abutting or benefitted property for the cost of construction. If such be the only view to be taken of the sidewalk, which, by this proceeding, the defendant is to be required to construct, then the court below rightly sustained the demurrer. For it is the settled law of this state, as evidenced by numerous decisions, that the statutes providing for a gross earnings tax by railway companies exempt the property of such company that is used for railroad purposes, not only from all general or ordinary taxes, but from all local, special or extraordinary assessments or charges. First Division St. P. & Pac. R. Co. v. City of St. Paul, 21 Minn. 526; City of St. Paul v. St. P. & S. C. R. Co., 23 Minn. 469; Patterson v. C. R. & P. R. Co., 99 Minn. 454, 109 N. W. 993."

It is plain, therefore, that the attempt of the village in this case under Chapter 78 of the Laws of 1913 to compel

the railway companies to pay for the laying of a sidewalk in Bonde Street across their right of way cannot be justified as an exercise of the taxing power.

II.

CHAPTER 78 GENERAL LAWS OF MINNESOTA 1913, WHICH ATTEMPTS TO COMPEL RAILROAD COMPANIES TO BUILD SIDEWALKS IN THE STREET UPON THEIR RIGHT OF WAY AT THEIR OWN EXPENSE IS NOT A VALID EXERCISE OF THE POLICE POWER AND IS UNCONSTITUTIONAL AND VOID, BEING AN ATTEMPT TO DEPRIVE RAILROAD COMPANIES OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW AND DENYING TO THEM THE EQUAL PROTECTION OF THE LAW, IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

That the act in question is but a thinly veiled attempt by the legislature to exercise the taxing power under the guise of a police regulation seems to us so plain as to hardly admit of argument. The language used by the legislature in this Act does not contain a single word indicative of a legislative purpose to protect human life or property or serve any public necessity. If the Act had been intended as a police regulation it would be reasonable to expect that the legislature would have imposed such restrictions as would limit the application of the law to cases where the physical conditions resulting from the maintenance and operation of railroad tracks reasonably required sidewalks as a protection to the public. No such limitation can be found in the Act. On the contrary it is universal in its application to all streets and all municipalities, large and small, and without regard to the physical conditions, the width of the right of way, or the number,

location or grade of the tracks. By its terms the Act applies to every street crossing a railroad right of way, even though the tracks be elevated above or depressed beneath the street surface. The Act does not really apply at all to the space between the rails, at grade crossings, as it is expressly declared that cement or concrete construction shall not be required in track space "if some substantial and suitable sidewalk material is used in lieu thereof." This of course means that where a railroad company has already planked between rails and between tracks the full width of the street, as required by the general law in force when the amendment of 1915 was enacted, nothing further shall be required in the way of sidewalks at those points. As stated by the District Court (Record page 7)—

> "The sole object and purpose sought to be attained in and by these proceedings is to compel the respondents to construct a sidewalk on one side of the street as it is located across the entire right of way so that the sidewalk will connect with the said planking in either direction, but not so as to include in such construction the building of any sidewalk or crosswalk along that part of the street now occupied by said roadbed or tracks, which part is already sufficiently and securely planked for crossing purposes."

Presumably all railroad companies in Minnesota had complied with the general law as to planking at the time the amendment of 1913 was passed, therefore the only thing intended to be accomplished by that act was to impose upon railroad companies the equivalent of the ordinary assessment tax for the construction of cement or concrete sidewalks in the street upon that portion of the right of way not included within the planked portion occupied by railroad tracks. We respectfully submit that all this shows conclusively that the legislature was not attempting

to exercise police power for the safety or protection of life or property, but was merely attempting to increase the tax burdens of railroad companies in a manner forbidden by a higher law. An insuperable obstacle to such method of increasing the taxes of railroad companies exists in the state constitution, Article IV, Section 32a, which provides that no amendment of the gross earnings tax law shall become operative until adopted and ratified by a majority of the voters.

If the Minnesota legislature can thus require railroad companies to pay the cost of sidewalks in streets laid out across the right of way, it must also follow that a similar burden can be imposed for the cost of sidewalks in streets laid out upon and parallel with the right of way, but not crossing the tracks. To illustrate: Suppose the village of Clara City opens a street parallel with and upon the north side of our right of way leading to the depot, and thereupon under this or a similar act of the legislature calls upon the railroad companies to construct a sidewalk in the street the full length of that portion of the right of way which the street occupies. Here we have a sidewalk in a street upon a railroad right of way, a walk intended for the use of the public, in all respects such a sidewalk as the one proposed to be laid in Bonde Street up to and on each side of our tracks. Is there any argument which can be made against the validity of legislation or municipal action requiring the one as a police measure, which is not equally available against the other?

Again, if the legislature under the guise of the police power can compel railroad companies to pay the cost of sidewalks laid in the street within the right of way, without regard to physical conditions, or public necessity, what

constitutional guaranty can we invoke to prevent the collection in like manner of the cost of municipal sewers and water mains laid in the streets at the same points, or the cost of shade trees, boulevards, cluster lights, comfort stations, or any other municipal convenience placed in the street at any point within the right of way lines? All these things are about equally for the comfort and convenience of the people of the municipality, and, so far as the police power is concerned, it would be a purely arbitrary and unwarrantable distinction to place them in one class and sidewalks in another and different class.

Furthermore, if the legislature under the guise of the police power can compel railroad companies to pay for all these municipal improvements, there would seem to be nothing to prevent the legislature from providing that railroad companies shall pay the entire cost of drainage ditches within the limits of their right of way at the point of crossing. Certainly a drainage ditch is for the benefit of the public in the same sense as is a concrete sidewalk, and any argument in favor of sustaining the present act as to sidewalks would apply with equal force to a statute relating to the cost of drainage ditches along the highway across the right of way. Yet the Minnesota Supreme Court in Patterson v. C. R. I. & P. R. Co., 99 Minn. 454, held that the expense of such ditches could not be imposed upon railroad companies by way of assessment, for the reason that the gross earnings tax law excludes the power of assessment against railroad property. A decision in the case at bar sustaining this statute as to sidewalks would probably be followed by legislation compelling railroad companies to pay for drainage ditches across their right of way at highway crossings in Minnesota.

It is shown by the plat which accompanies the petition that our right of way at the intersection of Bonde Street is 300 feet wide. It is unoccupied by railroad tracks or other railroad structures except in its central portion where there are three tracks, all of which have been and are now planked the entire width of the street as required by law, thus affording safe and convenient passage along the entire width of the street for vehicles and pedestrians, so far as the use of the track space is involved. The portions of the right of way within the street lines on each side of the tracks are in no respect different in character or surface condition from the adjoining portions of Bonde Street outside the right of way limits. For a distance of more than 100 feet of the street on both sides of the tracks, there is absolutely nothing in the character or use of the ground to distinguish the portion of the street within the right of way lines from the adjoining portion outside of them. It is all one uninterrupted, uniform, dirt-surfaced street. It is not claimed that the railroad companies have ever disturbed or in any way interfered with the surface of the street within the right of way lines, except where the tracks are laid, that is, in the space protected by planking. The only conceivable necessity or purpose of the proposed sidewalk is to promote the convenience of pedestrians in their use of the street. *There would be neither greater nor less necessity for the proposed sidewalk on that street if the railroad tracks were entirely removed.* The contention that such sidewalk in the street within the right of way lines, but outside of the track space, would render safer or more convenient the passage of pedestrians over the tracks is purely fanciful. It was suggested by the Minnesota Supreme Court as a possible justification for

the exercise of the police power, that sidewalks may be regarded as a safety device similar to planking between rails and tracks. The court said:

> "There can be no controlling difference between the requirement of sidewalk and of planking. Planking is to be sure, more to prevent persons in vehicles from injury, or the vehicles or teams from damage, by being stalled on the crossing. But, where a crossing is much traveled, safety, to say nothing of convenience, may require a separate space, like a sidewalk, reserved for pedestrians. There is a peculiar peril to travelers on foot, where many vehicles pass and the attention of the drivers is diverted to looking out for trains liable to use the crossing. Again, unless a well-defined walk be provided, there is danger of pedestrians crossing the tracks at places unexpected to those in charge of trains or cars, not to mention the inconvenience where mud and impassable conditions compel those on foot to deviate from the street proper."

That may be an argument proper to address to the municipal council upon a petition to have sidewalks laid in the street, but it does not seem to furnish any reason whatever in support of the claim that the expense of such sidewalks can be imposed upon a railroad company in the exercise of the police power. "Mud and impassible conditions" in the street may well justify a sidewalk, but not at the expense of a railroad company, unless it was responsible for the muddy or impassable condition. The "peculiar peril to travelers on foot" growing out of the fact that the street is also used by vehicles, is one which exists quite independently of the presence of railroad tracks across the street. Sidewalks are commonly found where there are no railroad tracks. It will be noted that the judge who wrote the foregoing hastened to add that it did not express his own views. He admitted that a sidewalk across the right of way is a convenience, if not a necessity, but he

was "unable to see how it is made so by defendant's ownership or use of the right of way. My own view is that the statute in question is not a valid exercise of the police power."

In exercising its police power a state cannot act arbitrarily or unreasonably. There must exist a reasonable necessity arising out of the situation, condition or evil at which the police regulation is aimed.

Gulf etc. Co. v. Ellis, 165 U. S. 150;
Connelly v. Union Sewer Pipe Co., 184 U. S. 540;
Dobbins v. Los Angeles, 195 U. S. 223.

The doctrine recognized and applied by the Minnesota Supreme Court in numerous decisions is that no uncompensated duty can be imposed upon a railroad company under the police power with respect to streets crossing its tracks, *other than such as is created by a condition or state of things directly resulting from the act of the railroad company in laying its tracks across the street.* The theory upon which the doctrine rests is that the railroad company has created a dangerous or inconvenient situation, the removal or prevention of which in the interest of public safety and convenience is justly chargeable to the railroad company.

In State ex rel. Minneapolis v. St. Paul M. & M. R. Co., 35 Minn. 131, the court said:

> "The common law rule is that where a person or corporation is given the right to build a railroad, or make a canal, across a public highway, this gives no right to destroy it as a thoroughfare, but they are bound to restore or unite the highway at their own expense, by some reasonably safe and convenient means of passage, although the statute contains no express

provision to that effect. This duty includes the doing of whatever is necessary to be done to restore the highway to such condition; as, for instance, in case of a bridge, the approaches or lateral embankments, without which the bridge itself would be useless. *This duty is founded upon the equitable principle that it was their act, done in pursuit of their own advantage, which rendered this work necessary,* and therefore they, and not the public, should be burdened with its expense." (Italics ours.)

In State v. District Court, 42 Minn. 247, which involved the question whether a railroad company could be compelled to put in cattle guards and sign boards at a highway crossing, where the highway had not been laid out until after the railroad was in operation, the court said:

"When the railroad company accepted its charter, it received its franchises subject to the authority and power of the state to impose such reasonable regulations concerning the use, *in matters affecting the common safety, of its dangerous enginery,* and not merely subject to the then existing regulations as applicable to then existing conditions; and whether the obligation now in question had been imposed at this time by direct act of the legislature, or, as in the case, arises from the laying out of a new highway, to which the previously existing law becomes applicable, can make no difference." (Italics ours.)

The court also said:

"It is but an exercise of the everywhere recognized police power of the state, *regulating by reasonable and necessary means the use of instrumentalities otherwise attended with obvious and great danger to the public.* No other principle is involved in such requirements than is involved in imposing a reasonable limitation upon the speed of railway trains at street crossings, and within the limits of thickly populated municipal districts, or in requiring a bell to be rung or whistle blown at highway crossings, or the stoppage of trains at railway crossings, and in other like provisions which are found in the statutes of every

state. Such statutory regulation of the use of property does not constitute a taking of the property, or its destruction. It is only the exercise of the power of the state to reasonably control the use of property and the conduct of the individual, so far as may be necessary for the public safety; and to such control every citizen and owner of property must submit without compensation." (Italics ours.)

In State v. St. Paul M. & M. R. Co., 98 Minn. 380, the court said:

"The common-law doctrine, that where a street or highway is laid over one already in existence, the expense of making the crossing safe rests upon the company or corporation using the new way, had its origin when railroads were unknown, at a time when the use of all highways, generally speaking, was of the same general nature, the traffic or use of either not being inherently dangerous to the free use and enjoyment of the other. *Not so where a railroad crosses a public street, or a street a railroad. In such a case the operation of trains over the latter, particularly in our large cities, is highly dangerous and a menace to the public using the intersecting street. The railroad company is alone responsible for this condition, and, though it has an unquestioned right to operate its trains in such manner as the practical conduct of its business may require, the dangers resulting therefrom are of its own creation, and on every principle of right and wrong it should bear the burden of protecting the public so far as practicable from accident or injury.*" (Italics ours.)

The court also said:

"In view of the fact that the railroad company takes its franchise subject to the reserved right of the state to lay new streets over and across its track, and in contemplation that it may do so, and the further fact that *the company is solely responsible for the necessity of safety devices at street crossings, the same being occasioned by the operation of its trains over and across the street,* and the further elementary principle that he who creates and maintains upon his premises

a condition dangerous and inimical to others is under legal obligation to so guard and protect it that injury to third persons may not result therefrom, the rule of the common law as to existing, must be held to apply equally to new, streets." (Italics ours.)

In Winona & St. Peter R. R. Co. v. Waldron, 11 Minn. 392, the court declared that the legislature may control and regulate the action of corporations just as a natural person may be controlled and regulated. The court said:

"These rights of the individual citizen are the object of protection by the government, but they are qualified by his relation to the public, and must not be exercised to the public injury. Whatever regulation therefore of individual rights is necessary to be prescribed for the public welfare is not only within the power of the legislature, but is incumbent on it to enact. The principle constitutes the police power of the state. *To this source the right of the legislature to impose upon existing railroad corporations the duty of fencing their roads, making cattle guards, regulating the speed of their cars, the use of signals, etc., is traced, and on this principle it is sustained.* Ohio & Miss. R. R. Co. v. McClelland, 25 Ill. 140; Galena & C. R. R. Co. v. Loomis, 13 Ill. 548; Nichols v. Low Ken. R. R. Co., 43 Me. 356; Redfield on Railways, 549, 554, and note and authorities cited." (Italics ours.)

To the same effect—

Gillam v. Sioux City & St. P. R. Co., 26 Minn. 268.

In Chicago M. & St. P. R. Co. v. City of Minneapolis, 115 Minn. 460, the court said:

"The general rule so established is that, where the safety, convenience, or welfare of the public require that a railway company carry its tracks over a public way or the public way over its tracks by a bridge, the uncompensated duty of providing such bridge devolves upon the railway company. The basis of this rule is the superior nature of the public right inherent in the reserved or police power of the state. A rail-

road, though constructed first in time, is constructed subject to the implied right of the state to lay out and open new highways crossing its right of way. *If the operation of the railway upon a particular surface or with a particular form of support for its tracks interferes with the public safety, convenience, or welfare in the exercise of the public right to the use of such highway,* then upon the railway company is placed the burden of making such necessary and reasonable readjustment of its tracks as will permit the exercise of the superior public right." (Italics ours.)

In State v. Donaldson, 41 Minn. 74, the court said:

"A law enacted in the exercise of the police power must in fact be a police law. If it be a law for the protection of public health, it must be a law having some relation to public health. * * * It is at least settled that if it is apparent on the face of the act that its provisions, from their very nature, cannot and will not conduce to any legitimate police purpose, it is the right as well as the duty of the court to pronounce it invalid, as in excess of legislative power and an arbitrary and unwarranted interference with the right of the citizen to pursue any lawful occupation."

And in Northwestern Tel. Ex. Co. v. Minneapolis, 81 Minn. 140, the court said:

"But this extensive power of regulation is not to be exercised at mere whim or caprice. It should be appropriate to and commensurate with the public necessity for the protection and promotion of public morals, health, safety, necessity or convenience; and the application of the police power cannot be extended by the authority which is entrusted with such application to an arbitrary misuse of private rights. Any such unwarranted exercise of authority is unconstitutional and void. State v. Addington, 12 Mo. App. 214; City of Swift, 113 Mich. 660, 72 N. W. 6."

The language of the court which we have italicised shows conclusively that in Minnesota, as elsewhere, the police power is limited, in its application to railways cross-

ing streets and highways, to the correction of evils, dangers and inconveniences *for which the railroad company is responsible.* The power cannot be exercised merely because the railroad track is in the street, but only because its presence there in fact creates a situation requiring legislative remedy.

Where this familiar test is ignored, as the Minnesota legislature and court have done in the present instance, the guaranty of equal protection of the law becomes an empty meaningless phrase.

If this statute is allowed to stand, hundreds of thousands of dollars can and will be collected from railroad companies in Minnesota to cover the cost of concrete sidewalks at crossings in every city and village, without the slightest pretense of responsibility or blame on the part of the railroad companies for the conditions prompting such municipal improvements.

The statute is so general and sweeping in its terms that it will apply, and was doubtless intended to apply, to crossings already provided with wooden, brick, cinder or stone sidewalks in good condition, whenever the municipality or private owners decide to lay concrete walks in the portions of the street adjoining the crossing. The requirement is that the railroad company shall construct sidewalks "to connect with *and correspond to* sidewalks constructed and installed by the municipality or by owners of abutting property." The fact that the existing sidewalk serves every purpose, enabling pedestrians to cross the right of way in safety and comfort, is to be ignored for the sake of mere uniformity in material and design. Whenever a new type of sidewalk is laid up to the right of way line, the railroad company must build one corresponding

thereto, regardless of any question of necessity or public safety. We earnestly contend that such an arbitrary and unreasonable law cannot be justified as an exercise of police power.

The words "safety device" accurately define the scope of the police power as applied to street crossings of railroad tracks, and should never be lost sight of. All courts agree that a line must be drawn somewhere between the police power and other legislative functions. Safety, the prevention of dangerous, uncomfortable or inconvenient conditions directly or indirectly resulting from the presence of the railroad tracks in the street, is, we believe, the only legitimate test. The act here in question cannot stand such test.

If a statute purporting to have been enacted to protect the public health, morals or safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is invalid.

Mugler v. Kansas, 123 U. S. 661;
Hennington v. Georgia, 163 U. S. 299;
Dobbins v. Los Angeles, 195 U. S. 223.

In Mugler v. Kansas this Court said:

> "The courts are not to be bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. *If, however, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to these objects, or is a palpable invasion of rights secured by the fundamental law,* it is the duty of the courts to so adjudge, and thereby give effect to the constitution." (Italics ours.)

That the statute in question is not a valid exercise of the police power, is further shown by its arbitrary requirement that railroad companies shall build sidewalks across their right of way to connect with and correspond to sidewalks constructed and installed *"by owners of abutting property."* This means that private individuals are given arbitrary power to compel railroad companies to incur the expense of building sidewalks to connect and correspond with those privately constructed, and this without regard to any question of public necessity or convenience. Should a number of merchants in the block adjoining the right of way decide that their private interests will be served by a cement sidewalk in lieu of an existing wooden or brick walk, they can, under this statute, proceed to construct it up to the right of way line and then force the railroad company to carry it across the right of way. There is absolutely no safeguard provided against such arbitrary acts of individuals. The statute does not limit its operation to cases where the question of necessity or public benefit has been determined by a court or public body of any kind. It puts a weapon into the hand of every abutting property owner, with express license to use it against railroad companies whenever he sees fit. It is indeed a novel delegation of the police power. We think the constitutional guaranty of equal protection of the laws was intended as a shield against that sort of legislation. The statute is of the sort condemned by this court in the case of Yick Wo v. Hopkins, 118 U. S. 356:

> "They seem to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons * * *. The power given

to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint."

In Northwestern Tele. Exc. Co. v. Minneapolis, 81 Minn. 150, the court, speaking of an ordinance requiring the removal of telephone poles from the streets, said:

"Such power cannot be unreasonably and arbitrarily exercised. This provision manifestly implies the exercise of judgment upon such necessities as are always liable to arise in improving the streets, to be enforced only for the public good in the administration of municipal functions, under the authority of the police power. In a proper case, where the city exercises its power of control in the regulation of the use of the streets by the plaintiff, *based upon necessity and the interests of the public,* that power will be sustained. Beyond that limit it cannot go."

In People v. Illinois Cent. R. Co., 235 Ill. 374, the Supreme Court of Illinois held that neither the state nor city could, in exercise of the police power, compel a railroad company, which had depressed a street to pass under its right of way and tracks, to repair the sidewalks upon the subway crossing after they had become worn and defective by street traffic. The court said:

"The elevation of appellee's tracks rendered necessary tearing up the pavement and sidewalk and lowering the surface of the street under the tracks for a sufficient distance on each side to provide proper and suitable approaches to the subway. All this was done by appellee at its own expense. Appellant contends that it is appellee's duty to forever maintain and keep in repair said street and sidewalks; that the ordinance requiring it to do this is not in violation of the charter provisions of appellee, and is a valid exercise of the police powers of the city of Chicago. * * * The charter of appellee contains no provision making it the duty of the railroad company to maintain a street or

highway intersected by it. It is made the duty of the corporation to restore the road or highway to its former state or in a sufficient manner not to have impaired its usefulness; and while we have no doubt of the right of the state, in the exercise of its legitimate police powers *for the protection and safety of persons and property crossing the railroad track,* to require the corporation to do anything reasonably necessary for the accomplishment of that object, no other object or purpose would justify the state in adding this additional burden to the provisions of the contract between it and the corporation. * * * It is not denied that, when the appellee elevated its tracks, it restored the streets and sidewalks to proper condition, and in our opinion its duty ended there. *The future maintenance of the streets was not imposed upon the corporation by its charter not by any law passed in the exercise of the police powers of the State.* In Ruhstrat v. People, 185 Ill. 133, 57 N. E. 41, 49 L. R. A. 181, 76 Am. St. Rep. 30, it was said the police power is limited to the enactment of laws demanded for the public health, comfort, safety, or welfare of society." (Italics ours.)

In City of Bloomington v. Illinois Central Railroad Co., 154 Ill. 539, speaking of the objects and purposes sought to be accomplished by the legislature in providing that railroad companies shall restore highways to their former state of usefulness, the court said:

> "*Safety of persons and property* is the object of the requirement. The grading of the approaches and the planking between the rails and tracks make it possible for men and teams to cross easily and quickly, and thus avoid collision with passing trains, thereby insuring their own safety and the safety of the persons and property upon the train." (Italics ours.)

In City of Chicago v. Pittsburgh, Ft. W. & C. R. Co., 247 Ill. 319, the city attempted to compel the railroad company

to re-pave the viaduct and approaches over the railroad tracks, put in new curbing and manholes, and lay new sidewalk. The Supreme Court held that the city could not impose that liability under its police power. The court said:

> "The railroad company must keep and maintain its crossings so that they will continue to meet the needs and requirements of an increasing population in respect to *the safety of persons and property.* Northern Pacific Railway Co. v. Duluth, 208 U. S. 583, 28 Sup. Ct. 341, 52 L. Ed. 630. *But this does not necessarily require the railroad to keep and maintain that which is for every practical purpose a street or highway, even though incidentally it is used as a part of the ascent or approach to reach the viaduct.* The railroad company, in State v. St. Paul, Minneapolis & Manitoba Railway Co., 98 ,Minn. 380, 108 N. W. 261 120 Am. St. Rep. 581, was compelled, under the police power of the state, to erect and maintain a viaduct and long approaches over its railroad. But the same court held, in State v. Northern Pacific Railway Co., 99 Minn. 280, 109 N. W. 238, 110 N. W. 975, that there were reasonable limitations upon the liability of the railway company to maintain and repair the so-called viaduct approaches; that where a part of these approaches was filled in permanently the full width of the street, resulting in a mere raising of the street grade, such permanently filled portions of the improvement constituted no part of the viaduct or 'approaches'; and that the curbing, paving and sidewalk upon those portions could not be charged to the railroad company." (Italics ours.)

In City of Chicago v. Pennsylvania Co., 252 Ill. 185, it was held that where a railroad had elevated its tracks so that its trains would not interfere with travel on the streets, the city could not, under its police power, compel the company to maintain lights in the streets, though the streets were darkened by the elevated tracks, because such

lights were unnecessary for the protection of the traveling public on account of the operation of the trains. The court said:

> "The police power is limited to the enactment of laws demanded for the public health, comfort, safety, or welfare of society. Ruhstrat v. People, 185 Ill. 133, 57 N. E. 41, 49 L. R. A. 181, 76 Am. St. Rep. 30. By elevating its roadbed and separating its grade from the grade of the street all danger of collisions between trains of the plaintiff in error and persons or property was entirely eliminated. In passing along the street in the subway beneath the tracks of plaintiff in error, no danger is encountered by reason of the operation of the trains of plaintiff in error. *Under the exercise of the police power, the only excuse which could be given to support the right of the city to require plaintiff in error to maintain lights in this subway would be that the same were necessary for the protection of the public on account of the operation of the railroad through the running of its trains.* That the public is no longer in danger because of the operation of the trains of plaintiff in error is conceded. It is only contended that defendant in error has the right to require plaintiff in error to maintain lights at this subway because the building of the structure required by the elevation ordinance has darkened the street. Plaintiff in error has a right to maintain its tracks across Twenty-second street by reason of the license given it by defendant in error to do so. Under the elevation ordinance it had a right to erect the structure it has erected across Twenty-second street. The city has no more right to require plaintiff in error to maintain lights in this subway merely for the reason that its structure has tended to darken the street, than it has to require the owners of buildings along the line of any street to keep the street lighted because the buildings, on account of their height, have tended to darken the street and make it less safe for travel. To require plaintiff in error to maintain such lights would be to deny it the equal protection of the laws." (Italics ours.)

It is respectfully submitted that the judgment of the Supreme Court of Minnesota should be reversed.

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Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1916

No. 510.

GREAT NORTHERN RAILWAY COMPANY AND WILLMAR AND SIOUX FALLS RAILWAY COMPANY,
Plaintiffs in Error
vs.
THE STATE OF MINNESOTA, ex rel., VILLAGE OF CLARA CITY,
Defendant in Error

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

"Section 4256 General Statutes 1913 provides as follows:

"Road crossings—Every such company shall construct and maintain in good repair and free from snow or other obstruction, wherever any of its lines shall cross a public road sufficient crossings, consisting of:

1. Sufficient grades, sixteen feet in width on each side of the center of such road, and of such slope as may be deemed necessary by the officers having charge of the public road.

2. A plank covering of the same width, securely spiked, extending the full length of the ties, the planks not more than one inch apart, the planking not more than two and one-half inches from the rails, and the surface thereof on a level with the top of the rails.

In municipalities such grades and planking shall extend the full width of the street, or of that part thereof graded or used for travel, and like planking shall be placed between all tracks which are not more than fifteen feet apart, AND A SUITABLE SIDEWALK SHALL BE CONSTRUCTED BY SAID COMPANY TO CONNECT WITH AND CORRESPOND TO SAID WALKS CONSTRUCTED AND INSTALLED BY THE MUNICIPALITY OR BY OWNERS OF ABUTTING PROPERTY, but cement or concrete construction shall not be required in track space actually occupied by the railroad ties if some substantial and suitable sidewalk material is used in lieu thereof. In case of roads newly established, such crossing shall be constructed within thirty days after the service on the nearest station agent or section foreman of such company of a notice, signed by the proper

officer or officers having charge of such road, that such crossing is required."

That part capitalized is the amendment under Chapter 78 of General Laws of 1913.

The provision of this act as amended is plain, and if valid, there can be no question but that the plaintiff in error must build the sidewalk as ordered. There is no question raised as to the regularity of the Council proceedings, or those begun to enforce them. The only question seems to be as to the constitutionality of the act. We are not aware that this exact question has ever been passed upon by the Supreme Court of the State of Minnesota or this Court, but the general principle involved seems to be well settled by decisions of both these Courts, and are easily distinquishable from the cases relied upon by the Plaintiff in Error.

The principle that legislative acts will not be held in conflict with the constitution unless it is apparent that there is a conflict is so elementary that no authorities need be cited to sustain the proposition. We simply call attention to this well known rule in order to claim the benefit of it.

We may assume that one of the principal reasons for the construction of sidewalks over railroad right of ways where they cross public streets in municipalities is for the purpose of protecting human life and property. The construc-

tion of the sidewalk is within the police power of the state, that it adds to the comfort and safety of the inhabitants of the village, and others who must necessarily use the sidewalk.

We will now see from authorities what the general rule is:

> According to the view very generally held, land occupied and used by railroad companies for roadbeds, depots, freight houses and other corporate purposes, whether the company be owner of the fee or has only an easement or qualified right therein, is to be regarded as real estate, which may be subjected by the legislature to special assessment for the opening, paving and grading of streets and for other local improvements in the same manner as the real property of private individuals."
>
> Dillon Mun. Cor. Sec. 1451 (5th Ed.)
>
> "It is almost uniformly held that the rails, ties and other appliances of street railways and other railroads, which are constructed in and along the streets of a municipality, constitute property of such a nature that it may be, and usually is benefited by the paving of a street, or by otherwise improving it; and that the legislature may impose, or authorize a municipality to impose, a special assessment upon such railways for the cost of the improvement."

Dillon Mun. Cor. Sec. 1452 (5th Ed.)

"A statute exempting property from taxation does not exempt it from an assessment for a local improvement."

Elliott on Roads and Streets Sec. 549.

"Exemption from 'all taxations' includes exemption from a privilege tax, but not exemption from an assessment for benefits arising from the opening of a street."

Notes on U. S. Constitution Page 350

In Cooley on Taxation (Page 416) the matter is thus discussed by the author:

"Special assessments are a peculiar species of taxation, standing apart from the general burdens imposed for state and municipal purposes, and governed by principles that do not apply generally. The general levy of taxes is understood to exact contributions in return for the general benefits of government, and it promises nothing to the persons taxed beyond what may be anticipated from an administration of the laws for individual protection and the general public good Special assessments, on the other hand, are made upon the assumption that a portion of community is to be especially and peculiarly benefitted, in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds; and, in addition to

the general levy, they demand that special contributions, in consideration of the special benefit shall be made by the persons receiving it. The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby, their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay. This is the idea that underlies all these levies. As in the case of all other taxation, it may sometimes happen that the expenditure will fail to realize the expectation on which the levy is made, and it may thus appear that a special assessment has been laid when justice would have required the levy of a general tax; but the liability of a principle to erroneous or defective application cannot demonstrate the unsoundness of the principle itself, and that which supports special assessments is believed to be firmly based in reason and justice.

This language was approved by the U. S. Supreme Court in Ill. Central Rd. Co. vs Decatur 147 U. S. 190 (37 L. E. 132).

This was apparently a well considered case from which we quote:

"These distinctions have been rec-

ognized and stated by the courts of almost every state in the Union, and a collection of the cases may be found in any of the leading text books on taxation. Founded on this distinction is a rule of a very general acceptance--that an exemption simply from taxation is to be taken as an exemption simply from the burden of ordinary taxes, taxes proper and does not relieve from the obligation to pay special assessments.*** "This rule of exemption has been applied in cases where the language granting the exemption has been broad and comprehensive. Thus in Baltimore of Greenmount Cemetery Proprs., 7 Md. 517. the exemption was from 'any tax or public imposition whatever,' and it was held not to relieve from the obligation to pay for the paving of the street in front ****from taxation of every description by and under the laws of this state,' and it was held that that did not include an assessment made to defray the expense of opening a street. It was observed. 'In our opinion the exemption must be held to apply only to taxes levied for state, local or municipal purposes A tax is imposed for some general or public object * * The assessment in question has none of the distinctive features of a tax; it is imposed for a special purpose, and not for a general or public object.'**

Another matter is this: In a general way it may be said that the probable amount of future taxes can be estimated. While of course no mathematical certainty exists, yet there is reasonable uniformity in the expenses of the government, so that there can be in the advance an approximation of what is given when an exemption from taxation is granted, if only taxes proper are within the grant. But when you enter the domain of special assessments there is no basis for estimating in advance what may be the amount of such assessments. Who can tell what the growth of the population will be in the vicinity of the exempted property? Will there be only a little village, or a large city? Will the local improvements which the business interest of that vicinity demand be trifling in amount, or very large? What may be the improvements which the necessities of the case demand? Nothing can be more indefinite and uncertain than these matters; and it is not to be expected that the legislature would grant an exemption of such unknown magnitude with no corresponding return of consideration therefor.

And again, as special assessments proceed upon the theory that the property charged therewith is enhanced in value by the improvement, the enhancement

of value being the consideration for the charge, upon what principles of justice can one tract within the area of the property enhanced in value be released from sharing in the expense of such improvement? Is there any way in which it returns to the balance of the property within that area any equivalent for a release from a share in the burden? Whatever may be the supposed consideration to the public for an exemption from general taxation, does it return to the property within the area any larger equivalent with the improvement than without it? If it confers a benefit upon the public, whether the general public or that near at hand, a benefit which justifies an exemption from taxation, does it confer any additional benefit upon the limited area by reason of sharing in the enhanced value springing from the improvement? Obviously not. The local improvement has no relation to or effect upon that which the exempted property gives to the public as consideration for its exemption; hence, there is manifest inequity in relieving it from a share of the cost of the improvement. So when the rule is laid down that the exemption, from taxation only applies to taxes proper it is not a mere arbitrary rule, but one founded upon principles of natural justice."

In Ford vs. Delta Pine Land Co. 164 U. S.

662 (41 L. E. 590) Justice Brewer speaking for the court said:

> "It is abundantly established by the decisions of this as of other courts that exemptions from taxation are to be strictly construed, and that no claim of exemption can be sustained unless within the express letter or the necessary scope of the exempting clause."
>
> Chapter 425, P. 688, Laws 1903, provides, among other things, that the property of railroad corporations "shall be in all respects subject to all special assessments for local improvements in the same manner and to the same extent as the property of individuals "

"This is an express and unambiguous declaration by the legislature upon a subject over which it has full power, which closes the question It is instructive, also, to note that. by the same law, it is provided that such assessments may be collected by ordinary action at law, thus obviating all practical danger of a sale and consequent severance of a part of the corporate property. It must therefore be held that all of the property assessed in the present case was subject to assessment, although it was a part of the entirety."

118 N. W. R. 182 (Wis.)

Whatever may be said for, or against, certain early cases in which railway property was

held exempt from certain local improvement assessments, it is apparent that the strict construction given in them has been somewhat relaxed and modified, if not entirely reversed.

We quote extensively from the very able and exhaustive opinion in State ex rel Minneapolis vs St. P. M. & M. Ry. Co. 98 Minn. 480, to show that the sidewalk assessment here involved ought to be sustained because it is a proper police regulation.

> "The obligation of the company in such cases arises from the rule of the common law that, where a new highway is laid out across one already in existence and use, the crossing must not only be made with as little injury as possible to the old way, but whatever structures may be necessary for the convenience and safety of the crossing must be erected and maintained by the person or corporation constructing and using the new way * * * The obligation exists in such cases independent of statute, and as observed, the authorities enforce it in all cases where the streets were laid out and in existence before the advent of the railroad, and it extends to grade crossings, bridges, and viaducts, or whatever may be essential and necessary to make the crossing safe. If the duty to construct and maintain the bridge in ques-

tion rests upon the railroad company, either by force of the provisions of its charter or at common law, it is clear that the city may enforce it. Its specially delegated supervision and control over streets and highways with authority to lay out and open new ones, vest in it authority to enforce all appropriate regulations sanctioned by the police power of the state.**

The authorities are not fully agreed upon the question whether the state may in the exercise of the police power, compel a railroad company, without compensation, to construct and maintain suitable crossings at streets extended over the right of way subsequent to the construction of the railroad. Our examination of the books, however, leads to the conclusion that the great weight of authority sustains the affirmative of that proposition. The right of the state so to act is maintained in the states of Maine, Connecticut, Illinois, New York, Tennessee, Indiana, Texas, Mississippi, Ohio, Nebraska, New Jersey, Vermont, Wisconsin, and by the Supreme Court of the United States. It involves an exercise of the police power, and the inquiry is whether such a requirement is a proper exercise of that power. It is unnecessary to enter into an extended discussion to show the extent to which the legislature may go in the exercise of this government-

al prerogative. The property, rights, and liberty of the citizens are to be enjoyed in subordination to the general public welfare, and all reasonable regulations for the preservation and promotion thereof are uniformly sustaid by the courts. 'Rights of property' like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.' * * *

The requirement embodied in Section 8 (2 Starr & Co., Ann. St., 1885, P. 1937, c. 114) that railroad companies shall construct and maintain the highway and street crossings and the approaches thereto within their respective rights of way, is nothing more than a police regulation. It is proper that the portion of the street or highway which is within the limits of the railroad right of way should be constructed by the railroad company and maintained by it, because of the dangers attending the operation of its road. It should control the making and repairing of the crossings for the protection of those passing along the

> street and of those riding on the cars. * * * We think the weight of modern authority is in accord with the views just expressed, and to the effect that everything goes to make up a crossing, safe for public use, is as essentially within police regulations as any part of it. * *"

Chicago vs. City 72 N. W. R. 1118, (Wis.)

This case was affirmed by this court per curiam 53 L. E. 1006, on authority of Northern Pacific Railway Co. vs. Minn. 208 U. S 583 (52 L.E. 630).

In Northern Pacific vs. State 208 U. S. 583, (52 L. E. 630 this court said:

> "The result of these cases is to establish the doctrine of this court to be that the exercise of the police power in the interest of public health and safety is to be maintained unhampered by contracts in private interests, and that uncompensated obedience to the laws passed in its exercise is not violative of property rights protected by the constitution."

Attention is also called to the case of C. M. & St. P. Ry. Co. vs. Minneapolis, 232 U. S. 430 (58 L. E. 671) wherein this court quotes with approval from the opinion in 98 Minn. 429, as follows:

> "In this case the Supreme Court of Minnesota has held that the charter of the company as well as the common law

require the railroad, as to existing and future streets, to maintain them in safety, and to hold its charter rights subject to the exercise of the legisiative power in this behalf. After referring to the facts involved in 232 U. S 430, this court said "If there is a distinction in the present case, it must lie in the fact that the crossing is an artificia waterway instean of a road. But it is none the less a public highway, established to afford an appropriate place of public passing. Walks are provided for those who go on foot, and it is not the concern of the plaintiff in error that others go in boats instead of vehicles. 'The way ought to be established,' said the Supreme Court of Minnesota, 'a canal or waterway, the walks along each side was clearly a public way subject to the rules governing public ways. It can not make a difference in the constitutional rights of the railway company that this way was not constructed entirely or chiefly of solid earth. It is the fact and not the mode of public passage that is controlling. The case must be regarded as being one of a public crossing provided by law and the authorities we have cited lead to the conclusion that the state without infringing the guarantees of the Federal Constitution could they require the railway com-

pany to make suitable provisions for carrying its tracks over the crossings without compensation."

Calling attention to the opinion of the Minnesota Supreme Court in the present case 130 Minn. 480 it will be noticed that that court after calling attention to the cases in which that court had held that the statutes providing for gross earnings tax exempted the property of railroad companies that is used for railroad purposes, not only from general and ordinary taxes, but from the local assessments, the court said:

> "But we think a sidewalk over the right of way of a railroad where it crosses a public street in a village or city may be considered from another point of view: The state in the exercise of its police power may for the safety and convenience and welfare of the public require a railroad to maintain its right of way over a street in a reasonably said condition. Even at common law the burden was cast upon a railroad to maintain that part of the public highway occupied by its tracks and right of way in a proper condition for travel. At common law the duty rests upon a railway corporation when it occupies a public thoroughfare with its tracks. To restore the same in some reasonably safe and convenient means to its former condition

of usefulness. And the duty is a continuing one, and the way must be kept in repair by the corporation whose act has made the duty necessary. * * * It is now settled that a municipality is impliedly clothed with the police power of the state to the extent that where the necessity exists it may compel a railroad corporation at its own expense to carry the street or highway over, by or under its right of way and maintain the highway in a fit condition for travel. This may include paving and sidewalk, at least so far as the right of way extends.

After citing numerous cases of this court, the court proceeds:

"These decisions clearly indicate that the burden of maintaining a reasonably safe and convenient crossing where a street crosses or a highway crosses a railroad's right of way is upon the railroad, although the burden in particular instances may be extremely onerous. It would seem to follow that what may be reasonable incident to this burden in the way of regulation is for that authority to prescribe which is exercising the police power of the state. * * * It goes without saying that in the legislature is vested the police power of the state in its fullest amplitude. It is also clear that the statute of which chapter 78 of the

laws of 1913, is an amendment, was enacted in view of this police power of the state to safe-guard and facilitate public travel. Unless the law as clearly amended clearly exceeds this power. it should be sustained.

The statute in so far as it requires planking does rightfully, we think, impose an uncompensated burden upon the railroads. * * If planking a public highway where the same crosses the tracks of a railroad company, may be so connected with the public safety and convenience that under the police power of the state the railroad company may be compelled to do it without expense to the public, it would seem to follow that a statute which requires performance of this duty, burdensome though it may be, can not be said to impose a tax or assessment upon the company.

There can be no controlling difference between the requirements of sidewalk and of planking. Planking is, to be sure, more to prevent persons and vehicles from injury or the vehicles or teams from damage by being stalled on the crossing. But where a crossing is much travelled safety, to say nothing of convenience, may require separate space like a sidewalk reserved for pedestrians. There is a peculiar peril to travelers on foot where

many vehicles pass, and the attention of the drivers is diverted to looking out for trains liable to use the crossing. Again unless a well defined walk be provided there is danger of pedestrians crossing the tracks at places unexpected to those in charge of trains or cars, not to mention the inconvenience where mud and impassable conditions compell those on foot to deviate from the street proper. * * * Within its right of way the company may at any time place additional tracks or change the location of those it maintains, and for that reason it also seems proper that the safety of the passage for the traveler for the whole should be placed upon the railroad company. The statute merely prescribes that it shall maintain a sidewalk over its legitimate right of way to correspond and connect with the sidewalk maintained under the supervision of the municipality so as to afford the pedestrians a reasonably safe and convenient crossing. This regulation does not appear to us to be an unreasonable or arbitrary exercise of the police power of the state. Nor do we consider the same to be a disguised attempt to levy a local assessment. The amendment of 1913 is designed to provide for the pedestrians a safe and convenient passage along the streets of municipali-

ties where such streets are occupied and crossed by the tracks and right of way of the railroad company.

In C. M. & St. P. Ry. Co. vs. City of Milwaukee, 72 N. W. R. 1118, which seems to be an unusually well considered case, such expressions as these are found in the opinion:

"It may be laid down as established beyond reasonable controversy that railroad corporations are subject to all such reasonable regulations as may from time to time be prescribed by legislative authority pursuant to the police power incident to the sovereignty of the state, and are also subject to the power reserved under the constitution to alter or amend a corporate charter. The charter of the corporation in no sense exempts it from police supervision or regulation. Such an exemption could never be implied from a mere grant of power and would not be valid if expressly conferred. It is frequently and rightly said that sovereign authority cannot divest itself of its ordinary police power over persons, natural or artificial, any more than it can of the power to make laws or to punish crime. To accurately define such power is not entirely free from difficulty, and is not necessary for the purposes of this case. It is sufficient to state some general prin-

ciples well established, within which all questions here involved plainly fall."

The court cites with approval the opinion of Justice Bradley in Beer Co. vs. Mass., 79 U. S. 25, where it was said:

"The police power at least extends to protection of the lives, health and property of citizens, the promotion of good order and good morals."

The opinion then continues:

In our judgment that is broad enough to cover the whole ground of police regulation—when we say that under it the legislative branch of the government may constitutionally enact all reasonable regulations to promote health, comfort, morals and peace of society, and the safety of individual members thereof, there is little more that can be said on the subject. When any enactment goes clearly beyond that, judiciously considered, it meets the bar of the constitution at some point, and is therefore void. The doctrine once advanced and contended for that a grant of corporate rights may carry with it an exemption from police supervision and an exercise of such supervision, constitutes an impairment of the contract between the state and the corporation long ago set at rest."

"Crossing signs, warning posts, cattle

in police regulations as any part of it. There is no good reason for singling out planking of the tracks from other essentials of a safe crossing, and saying that it is a mere structural change of the track and not a requirement for public safety. Nothing concerning a crossing any more promotes its safety than the usual planking, not only as regards protection to the track itself, but delays thereon and consequent dangers to life and property. It is as essentially a part of a safe crossing for the railway as it is for the highway, and so uniformly considered, as we understand it. * * * But as we determine the law to be, whenever the construction of crossing gates shall be reasonably required by law, obedience to the requirement will fall under the police power and not be a subject for compensation."

It is elementary that charters of public corporations in which the rights of the public are involved, are to be construed with strictness against the corporation, and liberally in favor of the public.

S. vs. St. P. M. & M. Ry. Co., 98 Minn., 480

If a municipality can not require a sidewalk to be built in the manner here contended for, the railroad right of way may forever be left without

sidewalks, to the constant detriment, annoyance and danger of those who must use the street as well as to the railroad companies. The municipal authorities have no right to trespass upon railroad property in order to build them. Unless, therefore, the companies voluntarily build sidewalks, which seems extremely unlikely in case all railway companies assume the attitude taken by the Plaintiff in Error in this case, none would ever be constructed.

It is most respectfully submitted that the decision of the Supreme Court of Minnesota was right, and that it should be affirmed

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